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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 918.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BOB WRIGHT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

FILED JANUARY 7, 1913.

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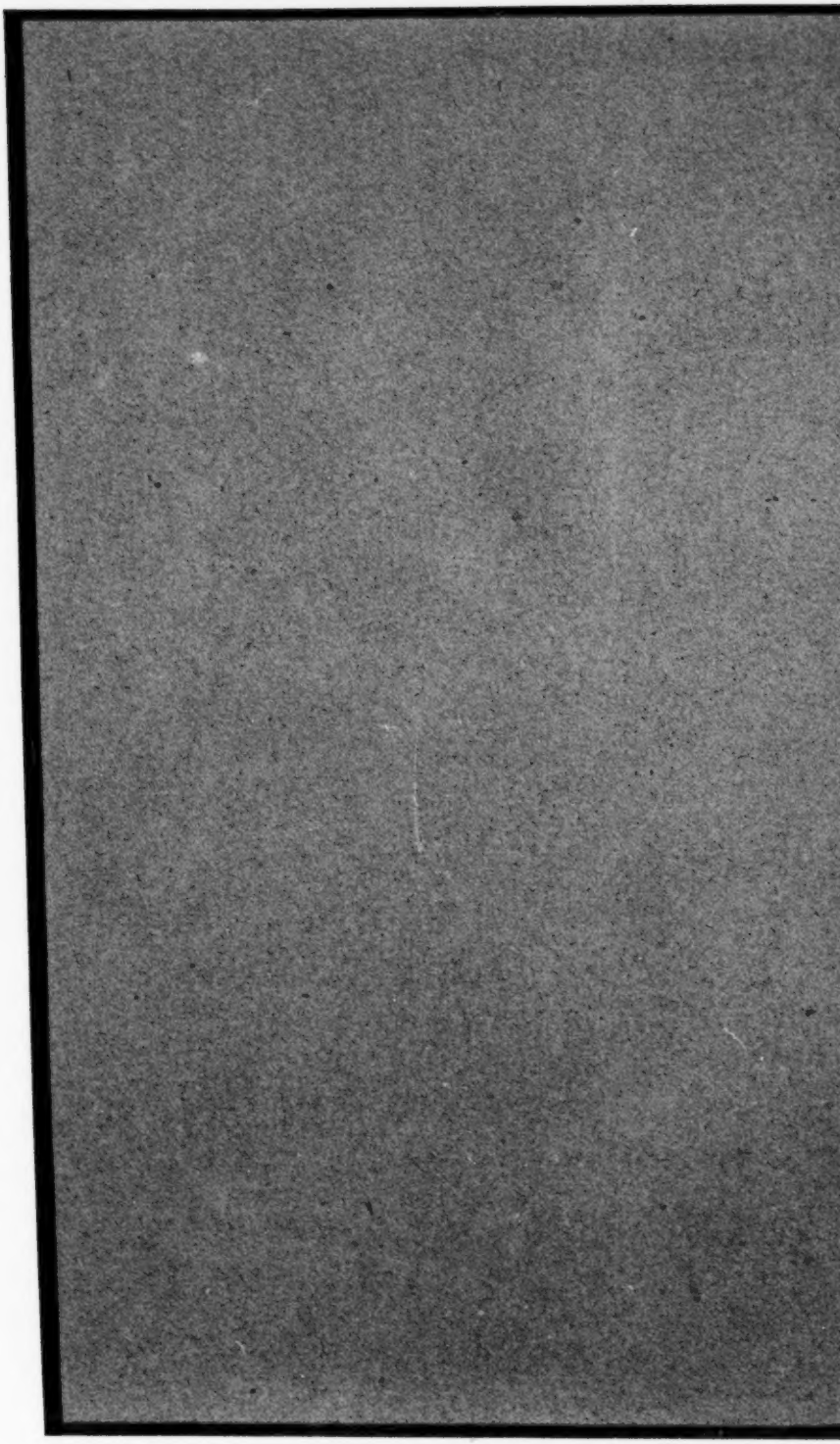

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1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled case:

UNITED STATES OF AMERICA, PLAINTIFF,
No. 696
BOB WRIGHT, DEFENDANT. } Criminal.

In the District Court of the United States in and for the Eastern District of Oklahoma, at the April term thereof A. D. 1912, at Tulsa, Oklahoma.

On the 3d day of May, A. D. 1912, the grand jurors of the United States of America, duly impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, returned true bill No. 696, against Bob Wright for introducing liquor into Indian country. Said bill of indictment is in words and figures as follows:

2 UNITED STATES OF AMERICA,
Eastern District of Oklahoma.

In the District Court of the United States, in and for the Eastern District of Oklahoma, at the April term thereof A. D. 1912, at Tulsa.

The grand jurors of the United States of America, duly impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, to inquire into and due presentment make of offenses against the said United States, on their oath do find, present, and charge that one Bob Wright, whose name is to the grand jurors otherwise unknown, on the nineteenth day of March, in the year 1912, in the county of Muskogee, in the said district and within the jurisdiction of said court, the said county and district then and there being a portion of the Indian country of the said United States, did at the time and place aforesaid, unlawfully, wilfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, whiskey.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WILLIAM J. GREGG,
United States Attorney.

(Endorsed as follows: Indictment introducing liquor into Indian country. A true bill. A. N. Wilcox, foreman. Filed in open court in the presence of the grand jury, May 3, 1912. R. P. Harrison, Clerk U. S. District Court.)

3 And thereafter, to wit, on the 29th day of August, A. D. 1912, the defendant, Bob Wright, filed demurrer to the indictment, which demurrer is in words and figures as follows:

4 In the United States District Court for the Eastern District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BOB WRIGHT, DEFENDANT. } Number 696.

Demurrer.

Now comes Bob Wright, defendant above named, and demurs to the indictment herein filed on the ground that the same does not charge this defendant with an offense against the laws of the United States.

DENTON & COCHRAN,
Attorneys for Defendant.

Endorsed as follows: Filed Aug. 29, 1912. R. B. Harrison, clerk U. S. District Court.

5 On this 19th day of November, 1912, the United States District Court for the Eastern District of Oklahoma, in special term at Muskogee, met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Criminal, No. 696.

UNITED STATES
vs.
BOB WRIGHT. } Introducing liquor into Indian country.

Now, on this 19th day of November, 1912, comes the United States by the United States attorney, and comes the defendant, Bob Wright, by Denton & Cochran, his attorneys, and this cause coming on for hearing on the demurrer heretofore filed by the defendant in this cause, it is ordered by the court that said demurrer be, and it is hereby, sustained, in accordance with opinion this day filed by the court, and this cause is dismissed and the defendant is discharged without day, to which decision, order, and judgment of the court the United States of America at the time duly excepted and excepts which exceptions are by the court allowed.

6 In the District Court of the United States for the Eastern District of Oklahoma.

UNITED STATES
vs.
BOB WRIGHT, DEFENDANT. } No. 696.

Opinion.

CAMPBELL, D. J.:

The question is on demurrer to the indictment. The indictment charges that the defendant on the 19th day of March, in the year

1912, in the county of Muskogee, in this district and within the jurisdiction of this court, the said county and district then and there being a portion of the Indian country, did, at the time and place aforesaid, unlawfully, wilfully, knowingly, and feloniously, introduce into such Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, whiskey, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. To this indictment the defendant has demurrer on the ground that the same does not charge him with an offense against the laws of the United States. It will be noted that the charge is not that the defendant introduced the liquor in question into the said Indian country from a point without the State of Oklahoma; the charge is that the defendant introduced whiskey into the said Indian country, but there is nothing to indicate the point from which the liquor was introduced by the defendant.

7 The court must take judicial cognizance of the fact that a large portion of the State of Oklahoma is not now Indian country, so that it follows that the charge would apply either to the introduction of liquor from a point without the State of Oklahoma, or to the introduction of liquor from a point within the State of Oklahoma but outside of that portion of the State still remaining Indian country. The offense charged is statutory.

"An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Such facts must be alleged that, if proven, defendant can not be innocent. Either the letter of the substance of the statute must be followed, and nothing is to be left to implication or intendment or to conclusion. The want of direct averments of material facts can not be supplied by argument or inference, not by the conclusion 'contrary to the form of the statute.'" (22 Cyc., 33 5.)

The demurrer, therefore, raises the question whether it is an offense cognizable in the Federal court to introduce liquor from a point within the State of Oklahoma but outside of that portion now Indian country, into such Indian country; or whether, on the other hand, the only cases of introduction of liquor into the portion of Oklahoma remaining Indian country, of which the Federal court has jurisdiction, are those in which the liquor is introduced from a point without the State into the said Indian country. This must be determined by the statute defining the offense, and from which this court acquires jurisdiction.

8 In ex parte Webb (224 U. S., ----) it was decided that sec. 8 of the act of March 1, 1895 (28 Stat., 693), as amended by the Oklahoma enabling act (34 Stat., 267), is still in force in that portion of the State of Oklahoma formerly comprising Indian Territory. Muskogee County is a part of what was formerly Indian Territory. This section, as originally enacted, read as follows:

"That any person, whether an Indian or otherwise, who shall in said Territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

By the Oklahoma enabling act above referred to it was enacted that the State of Oklahoma should incorporate in its constitution a provision prohibiting for the term of 21 years and thereafter until otherwise provided, the manufacture, sale, barter, giving away, or otherwise furnishing, with certain specified exceptions, of intoxicating liquors within the country then known as Indian Territory, and certain other portions of the State, and prescribing a penalty for the violation of such provision. It was provided further, however, that the State legislature might provide by law for State liquor dispensaries; and it was further expressly provided by the enabling act that:

9 "Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of the State."

In the Webb case, supra, the court said:

"It is not open to serious dispute that if the prohibition of the act of 1895 against 'carrying into said Territory any such liquors or drinks' remains operative so far as pertains to the carrying of intoxicating liquors from another State into that part of Oklahoma which was the Indian Territory, the acts admittedly done by the petitioner constitute an offense thereunder, of which the United States district court has jurisdiction. Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject for inquiry on habeas corpus."

An examination of the indictment in that case develops that the introduction of the liquor was charged as from without the Indian country into the Indian country, it not appearing whether it was

from a point without or within the State. But, as suggested by the court, the defendant having admitted in the agreed statement of facts upon which that case was presented that the liquor was introduced from a point outside the State, the matter of the charge in the indictment became immaterial, so far as the inquiry upon habeas corpus was concerned. Referring to the enabling act, the court say:

"It will be observed that its first section provides that nothing in the constitution of the new State shall be construed 'to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.' Also that paragraph 3 requires that the constitution shall prohibit the manufacture and sale of intoxicating liquors within those parts of the proposed State known as the Indian Territory and the Osage Indian Reservation, and within any other parts of said State which existed as Indian reservations on January 1, 1906, and shall prohibit the shipment or conveyance of such liquors from other parts of the State into the portions just described; the prohibition to continue for a period of 21 years, and thereafter until the people shall otherwise provide by constitutional amendment and proper State legislation; with a proviso for the establishment of State agencies for the sale of liquors for medicinal purposes and to bonded apothecaries of denaturized alcohol for industrial purposes and of alcohol for scientific purposes; and with elaborate provisions for carrying the prohibition into effect and preventing any abuse of the limited privileges conferred; it being declared, at the same time, that 'Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.'

"Pursuant to this act, a constitutional convention prepared and submitted to the people for adoption a constitution containing the clauses thus prescribed by Congress. At the same time a separate constitutional provision was submitted for establishing State-wide liquor prohibition, substantially in the same terms and subject to the same provisions that were prescribed with respect to the Indian Territory and the Indian reservations, by the enabling act. The constitution and the separate constitutional provision were duly adopted by the people, and on November 16, 1907, by proclamation of the President, Oklahoma was admitted as a State of the Union.

"No doubt the enabling act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State and respecting commerce in such liquors conducted wholly within the State; and, to the extent that the scheme of prohibition established by the enabling act cov-

ered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed."

Here is a distinct holding that the enabling act had the effect of remitting to the State government the enforcement of that portion of said section 8 respecting the manufacture, sale, barter, etc., of such liquors, conducted wholly within the State, and respecting commerce in such liquors conducted wholly within the State. The field covered by the scheme of prohibition established by the enabling act was that of the manufacture, sale, barter, etc., within the portions of the State affected by this provision of the act, and the introducing of such liquors from other portions of the State into such affected portions. Prior to statehood section 8 of the act of 1895 had covered these offenses, as well as that of introducing from other
11 States into the Indian Territory, so that it follows that by the enabling act that portion of said section 8 relating to the manufacture, sale, barter, etc., of such liquors within what was formerly Indian Territory, as well as the introduction of such liquors from other portions of the State into that portion of the State, was impliedly repealed. The court proceeds:

"But the act of 1895 included offenses that are not covered by the prohibition scheme of the enabling act; it prohibited the carrying of intoxicating liquors from other States into territory that was included in the State of Oklahoma. And the question for present solution is whether the act of 1895, having been partially repealed as just indicated, remains in force as a prohibition against such interstate traffic. In deciding it we shall do well to bear in mind that the offense of importing or 'introducing' or 'carrying in' such liquors into a protected district is different in its nature and readily distinguishable from the offenses of manufacturing, selling, etc., within the district; that from the earliest times they have been treated in Federal legislation as different offenses; that Congress for many years has consistently pursued the policy of forbidding sales of liquor to Indians and excluding it from country occupied by them; that the prohibition of importations has been deemed necessary to effectuate the purpose of preventing the use of it in protected districts; that the act of 1895 was passed for the evident purpose of enforcing the twofold prohibition in the Indian Territory; and that by agreements with the Indian tribes inhabiting the Territory (as will appear below) the United States was, to some extent at least, pledged to maintain the prohibition. Besides these consideration', it is to be noted that the enabling act, while containing most stringent clauses for preventing (at least for twenty-one years) the manufacture of and traffic in liquors within the Indian Territory, and their transportation from other parts of the new State into the Territory, imposes no duty upon the new State with respect to preventing liquors from being brought into the Territory from other States.

"In view of these consideration', and others to be mentioned, it seems to us that Congress, so far from intending by the enabling act to repeal so much of the act of 1895 as prohibits the carrying of intoxicating liquors into the Indian Territory from points without the State, framed the enabling act with a clear view of the distinction between the powers appropriate to be exercised by the new State over matters within her borders and the powers appropriate to be exercised by the United States over traffic originating beyond the borders of the new State and extending within the Indian Territory."

12 After referring to the several treaty and agreement provisions with the Five Civilized Tribes, whereby the Government agreed to prohibit the introduction and sale of liquors among such Indians, the court proceeds:

"It seems to us that the provisions of the enabling act show that Congress recognized that, because of these agreements or otherwise, the Government of the United States was under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of the other Territory that went to form the new State. We are unable otherwise to explain the insertion in the proposed constitution of the clause establishing liquor prohibition within the Indian Territory and the exclusion of the other Territory from the operation of this clause. This action is indicative of a purpose on the part of Congress to fulfill the spirit, as well as the letter, of the agreements with the Five Tribes. There were differences in those treaties, so far as the liquor traffic is concerned. But in the enabling act all the tribes were treated alike, and in a manner to fulfill the amplest promise given to any tribe, so far—but only so far—as the establishment of general prohibition within the new State was concerned.

"But if the Federal law that had prevented the bringing in of intoxicating liquors from without the State was at the same time repealed, the pledges of the Government were thereby in a material part broken. For, manifestly, it would be of comparatively little use to prohibit the manufacture of intoxicating liquors within the Territory and their shipment from other parts of the State into the Territory if at the same time all laws prohibiting the introduction of such liquors from other States into the Territory were to be repealed."

It will be seen, therefore, that the Supreme Court construes the prohibition feature of the enabling act whereby the manufacture, sale, or otherwise disposing of liquors within the prescribed territory, and its introduction from other portions of the State, is prohibited by a law made enforceable in the State courts as the fulfillment of the amplest promise given to any tribe, so far—but only so far—as the establishment of general prohibition within the new

State is concerned, but leaving to the Federal Government the duty of prohibiting its introduction from without the State, without which the court concludes the enforcement of prohibition within the State would have been of little use.

13 In United States Express Co. vs. Friedman, 191 Fed., 673, the Circuit Court of Appeals had before it the question as to whether the express company should be required, by writ of mandamus, to accept shipments of liquor at Fort Smith, Arkansas, consigned to points in this State formerly within the limits of Indian Territory, the question involved being whether the several acts of Congress in force prior to statehood prohibiting the introduction of liquor into Indian Territory had been repealed, so far as interstate shipments were concerned. The court appears to hold that, so far as the introduction of intoxicating liquor is concerned, the Indian Territory portion of the State is still "Indian country," and that the act of January 30, 1897, so far as it relates to the introduction of such liquor from points outside of the State, is still in force, and in the course of the opinion say:

"Generally speaking, the liquor traffic within a State is within the control of that State, while shipments from without the State are under the control of the Congress of the United States. The Government, bound by its obligations to its wards, who were, as it was hoped, gradually emerging from the necessity for guardianship, and by its solemn engagements with the Seminoles and Creeks, was unwilling that there should be any conflict between its duty to the Indians and the action of the new State, and as a condition of its admission required the new State to solemnly pledge itself to prohibit the entire liquor traffic throughout the Indian Territory for a period of 21 years. It thus avoided all conflict of policy between it and the new State, so far as intrastate shipments were concerned; but it must be presumed that Congress knew that the State could not prevent interstate shipments of liquor, and that that could only be done by the Congress itself."

The case of Mosier vs. United States, 198 Fed., 54, recently decided by the Circuit Court of Appeals for this circuit, is relied upon by the Government as authority for holding that, notwithstanding the Webb case, supra, which deals only with the act of March 1, 1895, the acts of 1892 (27 Stat., 260) and 1897 (29 Stat., 506), being general statutes relating to liquor traffic among the Indians, are still in force in this district. It was held in the Mosier case that, notwithstanding the provisions of the enabling act whereby the State is required by its constitution and laws to prohibit the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicat-

14 ing liquors by or to any person within those parts of the State formerly comprising Indian Territory, and other specified Indian districts, the act of 1897, supra, is still in force, and the pros-

ecution of the defendant Mosier for selling liquor to a member of the Osage Tribe, in Osage County, comprising what was formerly the Osage Nation, was sustained. The court said:

"While Congress might at any time abandon its relationship of guardian towards Hazel Gray, it could not delegate the power granted by the Constitution of the United States to exercise guardianship towards her to the State of Oklahoma, and we do not think that Congress intended to delegate or abandon its power to regulate the sale, barter, exchange, or giving away of intoxicating liquors to Indians within the State of Oklahoma to that State by the provision in regard to the sale, barter, exchange, or giving away of such liquors contained in the enabling act. We think the true interpretation of the provision in the enabling act is that Congress thereby sought to carry out its treaty obligations and to do all in its power to suppress the traffic in intoxicating liquors among the Indians within said State, and that it is no defense to a prosecution by the United States under the act of January 30, 1897, to say that the State of Oklahoma could also punish this offense under its law."

By the Mosier case it is decided that the general laws of the United States prohibiting the sale of liquor to Indians are still in force in the Osage Nation. And in relation to this particular feature of the law, the Supreme Court in the Webb case said:

"Before passing, however, it should be noted that section 2139, R. S., and the act of 1897 contain prohibitions respecting the sale of intoxicating liquor to Indians, and in this, and perhaps in other important respects, cover ground not covered by the act of 1895. We must not be understood as deciding that these prohibitions are no longer in force within what was the Indian Territory, either because of the assumed effect of the act of 1895 in superseding the previous general statute of which the act of 1897 was amendatory, or because of the Oklahoma enabling act and the admission of the State thereunder. The assumption we make in favor of the petitioner is for the purpose of the present argument only."

But the clear import of the Webb case is that so far as it relates to the introduction of liquor from points in Oklahoma outside of what was formerly Indian Territory into that portion of the State, the act of March 1, 1895, has been repealed by the enabling act, notwithstanding the reservations therein contained. So far as the effect of the enabling act upon the act of March 1, 1895, is concerned, the foregoing conclusions are sustained by the opinion of Judge Cotteral, of the Western District of the State, recently rendered in the case of the United States vs. 56 Gallons of Whiskey et al., not yet officially reported.

It must follow that the provisions of R. S., sec. 2139, as amended by the act of 1892 and the act of 1897, so far as they related, if at all,

to the introduction of liquor into the Indian Territory from points outside of that Territory, but within what is now Oklahoma, must be considered as having been repealed by the enabling act.

The portion of section 8 of the act of 1895 not repealed must, therefore be construed to read substantially as follows:

"That any reason, whether Indian or otherwise, who shall carry, or in any manner have carried, or who shall be interested in carrying or in any manner having carried into that portion of the State of Oklahoma formerly comprising the Indian Territory, from any point without the State of Oklahoma, any vinous, malt, or fermented liquors or any other intoxicating drinks of any kind whatsoever, whether medicated or not, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month or more than five years."

This confines offenses of this character, of which the Federal court has jurisdiction, to those in which the liquor is introduced from a point without the State. It is a violation of the State law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the State court. In order to give
16 the Federal court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the State. This is an essential element of the offense, so far as the Federal court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained.

It does not follow, however, because the Federal court only has jurisdiction of cases involving the introduction of liquor into the Indian country, where the introduction is from a point without the State, that the Federal enforcement officers have not authority, under Revised Statutes, sec. 2140, and amendments thereto, to seize any such liquors found within the Indian country, whether introduced from without the State or from some other part of the State. The authority of such enforcement officers to seize and destroy any such liquors found within the Indian country, regardless of the point from which they were introduced, is in no way involved in this case.

RALPH E. CAMPBELL,
Judge.

Endorsed: Filed Nov. 19, 1912. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

17 And thereafter, to wit, on the 14th day of December, A. D. 1912, the plaintiff, the United States of America, filed petition for writ of error, together with assignment of error, which petition for writ of error was allowed by the court. Said petition for writ of

error, assignment of errors, and order allowing writ of error are in words and figures as follows:

18 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* BOB WRIGHT, DEFENDANT IN ERROR.	Petition for writ of error.

Comes now the United States of America by William J. Gregg, United States district attorney, acting upon direction of the Attorney General in the above-entitled cause, and represents that on the 19th day of November, A. D. 1912, in the District Court for the Eastern District of Oklahoma, while sitting at a special term of said court begun and held at the city of Muskogee, in said Eastern District of Oklahoma, there was made and entered a judgment by said court in a certain criminal cause then pending therein wherein the United States of America was plaintiff and the defendant in error, Bob Wright, was defendant, by the terms of which judgment a demurrer theretofore filed in said cause by the defendant Bob Wright against the sufficiency of the indictment against him and then pending in said cause in said court charging him with a violation of the laws of the United States of America by unlawfully introducing intoxicating liquor into Indian country, which said demurrer by the judgment of said court was sustained and held sufficient as against said indictment, and an order of said court was duly entered dismissing said indictment against said defendant Bob Wright and discharging him from further pleading thereto and from the custody of said court without day.

19 Your petitioner further represents that the decision of the said district court sustaining the sufficiency of the demurrer aforesaid, involved the construction of the statutes of the United States upon which said indictment was founded in connection with the statutes of the United States authorizing the organization and admission of the State of Oklahoma into the Union on an equal basis with other States and also involved the constitutionality, validity, and effect to be given statutes of the United States prohibiting the introduction of intoxicating liquors into Indian country, and particularly the provisions of section 8 of the act of Congress of March 1st, 1895, being 28th Statutes at Large, 693, and section 1 of the act of Congress of January 30, 1897, 29 Statutes at Large, 506, as applied to that portion of the State of Oklahoma formerly known as Indian Territory, and alleged in the indictment to be Indian country, upon which last mentioned statute the indictment in said cause was based.

Your petitioner further represents that in said judgment and order of the United States District Court for the Eastern District of Oklahoma sustaining the demurrer of the defendant, Bob Wright, against the indictment returned into said court by the grand jurors

thereof there occurred and is manifest error to the prejudice and great damage of your petitioner herein, the United States of America, and the United States of America therefore prays that a writ of error may issue in said cause granting to the United States of America the right of appeal from the judgment of the United States District Court for the Eastern District of Oklahoma to the Supreme Court of the United States, and that the proper order
20 of this court be made directing the clerk of the United States District Court for the Eastern District of Oklahoma to prepare, certify, and send to the Supreme Court of the United States in the manner provided by law the record in that court of all the proceedings had therein in the case of the United States of America against Bob Wright, defendant, in order that the same may be there examined and reviewed, and if there be found error in the judgment of the United States district court in sustaining the demurrer interposed by the defendant, Bob Wright, and dismissing the indictment against him that said judgment and order may be reversed, to the end that complete and perfect justice may be done between the parties, and that upon the granting of the appeal prayed herein that a writ of error and order of citation may issue as provided by law, and that all further proceedings in said cause in said court be suspended until the determination of said writ of error by the United States Supreme Court, and that such further proceedings be had in this cause as shall in all respects conform to the provisions of law.

WILLIAM J. GREGG,
United States District Attorney.

Indorsed as follows: Filed Dec. 14, 1912. R. P. Harrison, clerk U. S. district court.

21 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
BOB WRIGHT, DEFENDANT IN ERROR.
} Assignment of errors.

Comes now the United States of America, plaintiff in error, and avers and shows that in the record and proceedings in said cause had in the United States District Court for the Eastern District of Oklahoma error occurred to the great damage and wrong of the plaintiff in error herein. (The errors assigned being based upon the judgment and decision of the District Court for the Eastern District of Oklahoma in sustaining the demurrer interposed by the defendant in error, Bob Wright, to an indictment theretofore returned by the grand jurors in that court in a certain criminal action then pending in that court in which the United States of America was plaintiff and

Bob Wright was defendant.) The errors complained of committed by the United States District Court for the Eastern District of Oklahoma are as follows, to wit:

I.

The court erred in sustaining the demurrer filed by the defendant in error in the District Court of the Eastern District of Oklahoma to the indictment returned in said court by the grand jurors and then pending therein against said defendant and in rendering the judgment of said court dismissing said indictment and dis-
22 charging the defendant in error from further answering or pleading thereto and discharging him from the custody of said court without day.

II.

The court erred in failing and refusing to overrule defendant's demurrer to the indictment of the grand jurors returned into said court and in not compelling the defendant to plead to said indictment.

III.

The court erred in construing the provisions of section 8 of the act of Congress of March 1st, 1895 (28 Stat. L., 693), as applied to the facts charged in the indictment.

IV.

The court erred in construing section one of the act of Congress of January 30, 1897 (29 Stat. L., 506), as applied to the facts charged in the indictment.

V.

The court erred in holding that the act of Congress of June 16, 1906, known as the Oklahoma Enabling Act, repealed either expressly or by implication any of the provisions of section 8 of the act of Congress of March 1st, 1895 (28 Stat. L., 693).

23 VI.

The court erred in holding that the act of Congress of June 16, 1906, known as the Oklahoma enabling act, repealed either expressly or by implication any of the provisions of section 1 of the act of Congress of January 30, 1897 (29 Stat. L., 506).

VII.

The court erred in holding that the intrastate transportation of intoxicating liquor in the State of Oklahoma, in the manner charged in the indictment, was and is not a violation of any law of the United States.

VIII.

The court erred in its construction of the several Federal statutes, to wit: Section 8 of the act of March 1st, 1895 (28 Stat. L., 693); section 1 of the act of January 30, 1897 (29 Stat. L., 506), and the several provisions of the Oklahoma enabling act, being the act of Congress of June 16, 1906 (34 Stat. L., 267), and in holding that under and by virtue of the provisions of said act of Congress of June 16, 1906, all of the provisions of said section 8 of the act of March 1st, 1895, and all of the provisions of section 1 of the act of January 30, 1897, were and are repealed in so far as they relate to the introduction of intoxicating liquor into Indian country located within the State of Oklahoma and particularly as applied to
24 that portion of the State of Oklahoma formerly known as Indian Territory and which is charged in the indictment as being Indian country.

IX.

The court erred in holding that as a matter of law there could be no violation of any Federal statute in the act of introducing intoxicating liquors from what was formerly Oklahoma Territory into what was formerly Indian Territory, both of said territories being included within the present State of Oklahoma at the time of the occurrence of the acts charged in the indictment.

X.

The court erred in construing the laws of the United States of America prohibiting the introduction of intoxicating liquors into the Indian country as applied to the facts charged in the indictment in said cause and in holding that intoxicating liquor can be lawfully introduced from points within the State of Oklahoma formerly within the Territory of Oklahoma to points within said State of Oklahoma formerly within the Indian Territory as applied to the facts charged in the indictment.

XI.

The court erred in holding that only interstate shipments of intoxicating liquor into what was formerly Indian Territory constitutes a violation of the United States laws upon the subject of intro-
25 ducing intoxicating liquor into Indian country as applied to the facts charged in the indictment.

Wherefore for these and other manifest errors appearing upon the record the said United States of America, plaintiff in error, prays that the judgment of the District Court of the Eastern District of Oklahoma be reversed, set aside, and held for naught, and that such

proper order and direction be issued from this court to the said United States District Court for the Eastern District of Oklahoma for further proceedings in said criminal cause as shall be proper and lawful to be made.

WILLIAM J. GREGG,
United States Attorney.

Endorsed as follows: Filed Dec. 14, 1912. R. P. Harrison, clerk U. S. District Court.

26 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB WRIGHT, DEFENDANT IN ERROR.

Be it remembered that on this 14th day of December, A. D. 1912, there was presented to me in chambers at the city of Muskogee, in the Eastern District of Oklahoma, a petition filed on behalf of the United States of America, praying for the allowance of a writ of error and citation in the above entitled cause. That said petition was heard by me and considered and the writ as prayed for is allowed; and

It is therefore ordered that a writ of error be allowed the said United States of America in said cause to be issued by the clerk of this court as by law provided.

It is further ordered that a true copy of the record, assignment of errors, petition for writ of error, order allowing the same, and all proceedings had in the United States District Court for the Eastern District of Oklahoma in the case of United States of America against Bob Wright, defendant, be prepared and transmitted to the Supreme Court of the United States by the clerk of the District Court for the Eastern District of Oklahoma, and that the same be properly certified by the clerk of said court as the law directs, that the Supreme Court of the United States may inspect and review the same and do what according to law should be done.

RALPH E. CAMPBELL,
District Judge U. S. Dist. Court for Eastern District of Oklahoma.

Endorsed as follows: Filed Dec. 14, 1912. R. P. Harrison, clerk U. S. District Court.

27 And thereafter, to wit, on the 14th day of December, A. D. 1912, the parties hereto filed stipulation as to what portion of

the record in this case should be submitted on appeal. Said stipulation is in words and figures as follows:

28 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB WRIGHT, DEFENDANT IN ERROR.

It is hereby stipulated by and between plaintiff if error and defendant in error by their respective attorneys of record, that the following portions of the record in this case in the court below shall be submitted on appeal to the clerk of the Supreme Court of the United States, to wit:

Citation.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Writ of error.
Indictment.
Demurrer of defendant.
Judgment of the court sustaining demurrer and discharging defendant.
The opinion of the court sustaining defendant's demurrer to the indictment filed in said cause.

Witness our signatures this, the 16th day of December, A. D. 1912.

THE UNITED STATES OF AMER.,
By WM. J. GREGG,
United States District Attorney.
JAMES C. DENTON,
Attorney for Defendant in Error.

Endorsed: Filed December 14, 1912. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

29 *Certificate of clerk.*

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify the above and foregoing to be a full, true, and correct transcript of the record in the case of United States of America vs. Bob Wright, as required by the stipulation of counsel filed in said case.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Muskogee, this 1st day of January, A. D. 1913.

[SEAL.]

R. P. HARRISON, *Clerk,*
By H. E. BOUDINOT,
Deputy.

30 *Citation.*

United States of America, the President of the United States of America, to Bob Wright, greeting:

You are hereby cited and admonished to be and appear in and before the Supreme Court of the United States in the city of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the office of the clerk of the Supreme Court of the United States of America, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 14th day of December, in the year of our Lord one thousand nine hundred and twelve.

RALPH E. CAMPBELL,
United States District Judge
for the Eastern District of Oklahoma.

I, the undersigned attorney of record for Bob Wright, the defendant in error named herein, hereby accept service of the above citation and writ for and on behalf of said defendant in error this 16th day of December, A. D. 1912.

JAMES C. DENTON,
Attorney of Record for said Defendant in Error.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern Judicial District of Oklahoma, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you at the special term of said court began and held at the city of Muskogee, in said district, in a certain criminal action then pending in said court, wherein the United States of America was plaintiff and Bob Wright was defendant, in which the judgment of the District Court of the Eastern District of Oklahoma was entered sustaining the demurrer of the defendant to the indictment of the grand jurors of said court returned against him and then pending therein, and it appearing that a manifest error hath happened, to the great damage of said the United States of America, as by the petition of said United States appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, in the District of Columbia, and filed in the office of the clerk of the Supreme Court of the
32 United States on or before the 13th day of January, A. D. 1913, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States of America may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14th day of December, in the year of our Lord one thousand nine hundred and twelve.

Issued at office in the city of Muskogee, with the seal of the District Court of the United States for the Eastern District of Oklahoma, dated as aforesaid.

[SEAL.]

R. P. HARRISON,
Clerk of the United States District Court for the Eastern Judicial District of Oklahoma.
By ——— ———,
Deputy.

Allowed by—

RALPH E. CAMPBELL,
Judge.

Return to writ.

UNITED STATES OF AMERICA, *Eastern Judicial District of Oklahoma, ss:*
In obedience to the command of the within writ, I hereby
33 transmit to the Supreme Court of the United States of America a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said district court, at office at the city of Muskogee, this 1st day of January, A. D. 1913.

[SEAL.]

R. P. HARRISON,
Clerk of said Court.
By H. E. BOUDINOT,
Deputy.

34 (Indorsed:) In the United States Supreme Court. United States of America, plaintiff in error, vs. Bob Wright, defendant in error. Writ of error. To the District Court of the United States for the Eastern Judicial District of Oklahoma. Filed Dec. 14, 1912. R. P. Harrison, clerk U. S. District Court.

(Indorsement on cover:) File No. 23493. E. Oklahoma, D. C. U. S. Term No. 918. The United States, plaintiff in error, vs. Bob Wright. Filed January 7, 1913. File No. 23493.

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Office Supreme Court, U. S.
FILED.
FEB 1 1913
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 918.

THE UNITED STATES OF AMERICA,

Plaintiff in error,

v.

BOB WRIGHT,

Defendant in error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

MOTION BY THE UNITED STATES TO ADVANCE AND TO TRANSFER TO THE SUMMARY DOCKET.

The Solicitor General moves that this case be advanced for hearing and placed on the summary docket.

This cause comes up under the criminal appeals act, the court below having sustained a demurrer to the indictment on the ground that the provisions of law upon which it was founded had been repealed by the Oklahoma enabling act.

The motion to advance is founded upon the priority authorized by the criminal appeals act, and also more particularly upon the administrative necessity of obtaining an early determination of the question involved, which was expressly left open in *Ex parte Charley Webb*, 225 U. S. 663, 676. It is as follows:

> Whether the act of January 30, 1897, c. 109 (29 Stat. L. 506), is applicable to "Indian

country" within the State of Oklahoma and to similar country within other States, or whether its application to such country has been entirely repealed by the Oklahoma enabling act (34 Stat. 269), discussed in the *Charley Webb* case.

The court below held, in substance, that the Federal Government could not apply the act of 1897 in Oklahoma, even to prevent the introduction of intoxicating liquors into lands constituting "Indian country"—in other words, into restricted lands or lands to which the Indian title has not been extinguished.

The interest of the Indians requires that the scope of the Federal jurisdiction of these matters should be determined as soon as practicable, because at present they and their property are practically without protection from the effects of the liquor traffic. The Federal authorities are prevented by this decision from acting effectively, and the county attorney has notified the United States district attorney at Muskogee that "the court funds are exhausted and [that] it will be impossible for me to try to enforce the law against whisky traffic." The surreptitious violators of the law will undoubtedly take advantage of the situation when it becomes known that the court is without funds to prosecute them.

Opposing counsel concur in the motion to advance.

WM. MARSHALL BULLITT,
Solicitor General.

JANUARY 30, 1913.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
BOB WRIGHT.
No. 918.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

The opinion below is not yet reported.

The case comes up under the Criminal Appeals Act to review a judgment sustaining a demurrer to an indictment. The indictment charged the unlawful introduction of intoxicating liquors into the "County of Muskogee in the said district and within the jurisdiction of said court, the said county and district *then and there being a portion of the Indian country* of the said United States." This county is a part of that portion of Oklahoma which was formerly the Indian Territory.

The trial court held that the indictment was invalid because it failed to allege that such introduction was from outside the State of Oklahoma, the theory be-

ing that if the introduction were from within the State it would not be in violation of any Federal law.

The indictment, therefore, as construed, amounts to a charge that the defendant introduced intoxicating liquors from a point inside the State of Oklahoma into "Indian country" within the portion of Oklahoma which was formerly the Indian Territory.

THE STATUTES.

The statutes necessary to be considered are collected in the appendix. They are:

1. The acts hereinafter referred to as "the General Indian Intercourse Acts":

R. S., sec. 2139 (Appendix, p. I), as amended by act of July 23, 1892, 27 Stat., 260 (Appendix, p. II).

Act of January 30, 1897, 29 Stat., 506 (Appendix, p. III).

These acts purport to apply generally throughout the United States.

They prohibit the furnishing of liquor to any Indian ward of the United States or the introduction thereof or attempts to introduce into any "Indian *country*" (being under the settled rule such particular lands as are in actual Indian title. *Bates* v. *Clark*, 95 U. S., 204; *Clairmont* v. *United States*, 225 U. S., 551).

2. The act hereinafter referred to as "the Indian Territory Prohibition Act" which is:

Sec. 8 of the act of March 1, 1895, 28 Stat., 693, 697 (Appendix, p. V).

This was an act which provided for appointment of additional judges of the United States courts in the Indian Territory and by section 8 prescribed a general prohibition law for that Territory. This general prohibition law was addressed to the furnishing of liquor to *anybody* within the Indian Territory and not merely to Indians, and to the carrying of liquors into *any* part of the Indian Territory whether "Indian country" or not.

3. The Oklahoma Enabling Act, hereinafter referred to as "The Enabling Act," being:

Act of June 16, 1906, 34 Stat., 267 (Appendix, p. VII).

In this act the State was required to put into its constitution a clause prohibiting for 21 years the manufacture, sale, etc., of intoxicating liquors within those parts of the State now known as the Indian Territory and the Osage Indian Reservation, and within any other parts of the State which were Indian reservations on January 1, 1906, and also prohibiting the introduction of intoxicating liquors into these portions of the State from any other parts of the State.

THE QUESTION.

In *Ex parte Charley Webb, Petitioner*, 225 U. S., 663, this court decided that, excepting as to the introduction of liquor from *outside* Oklahoma, the Indian Territory Prohibition Act had been repealed by the enabling act, but expressly reserved (p. 676) the further question whether the General Indian

Intercourse Liquor Acts are now in force in Oklahoma.

This latter question so reserved is the question here involved. It was ruled by the court below against the Government.

In our view the decision is contrary to the rulings of the Court of Appeals for the Eighth Circuit in *U. S. Express Co.* v. *Friedman*, 191 Fed., 673, and *Mosier* v. *U. S.*, 198 Fed., 54 (the latter now pending here on petition for writ of certiorari); but the court below deemed these cases distinguishable on grounds which are hereinafter discussed.

ARGUMENT.

Our argument is—

First. Even assuming for the purpose of the argument that originally the Indian Territory Prohibition Act created an exception of the Indian Territory from the operation of the General Indian Intercourse Acts, nevertheless the repeal of the excepting act by the Enabling Act restored the general rule.

Second. The Indian Territory Prohibition Act never created any such exception, but both acts were applicable to Oklahoma.

Third. The Enabling Act itself did not create such an exception.

FIRST POINT.

Even if the Indian Territory Prohibition Act of 1895 had the effect of excepting that territory from the operation of the Indian Intercourse Acts, its repeal by the Enabling Act eliminated the exception and restored the general rule.

As shown in the next point, both the Indian Territory Prohibition Act and the General Indian Intercourse Acts were concurrently in force in the Indian Territory right up to the time of the passage of the Enabling Act.

But assuming the contrary for the purpose of the argument, still the utmost effect which the Indian Territory Prohibition Act could have had upon the other series of statutes constituting the general rule throughout the United States as to Indian country would have been merely to effect an exception from that general rule.

C. M. & St. P. R. Co. v. *U. S.*, 127 U. S., 406.

Frost v. *Wenie*, 157 U. S., 46.

Ex parte Crow Dog, 109 U. S., 556, 570.

Chew Heong v. *U. S.*, 112 U. S., 536.

State v. *Stoll*, 17 Wall., 425.

The supposed exception was repealed by the Oklahoma Enabling Act (*Ex Parte Charley Webb, Petitioner*, 225 U. S., 663), and the repeal wiped out the exception and left the general acts free in their operation.

C. M. & St. P. R. Co. v. *U. S.*, 127 U. S., 406, supra.

I Sutherland, Statutory Construction, 2d Ed., secs. 275 and 295.

C., M. & St. P. Ry. Co. v. *U. S.* is pat on all fours. After holding, first, that the later of the two statutes there concerned was not repugnant to the earlier and did not repeal it, but was merely, in the language of Mr. Justice Story, in *Wood* v. *U. S.*, 16 Pet., 342, 363, "affirmative, cumulative, or auxiliary," the court further held that even if they were repugnant, the special one merely made an exception from the general one and when subsequently repealed left the general act unrestricted. The decision was stated by the court as follows:

> The most that can be said of sec. 5 of the act of 1879, construed with reference to sec. 3962 of the Revised Statutes, is that it makes an exception to the provisions of that section, so far as railway companies are concerned. Its repeal, therefore, leaves the original section in full force. (127 U. S., p. 406, 409.)

SECOND POINT.

Furthermore, the Indian Territory Prohibition Act never created any such exception, but both acts were applicable to Oklahoma.

Of course it is not necessary to determine this question if the First Point is sound.

The General Indian Intercourse Acts forbade the introduction of liquor into *Indian Country* or the sale of liquor to an Indian anywhere, and applied generally throughout the United States.

The Indian Territory Prohibition Act forbade the introduction of liquor into any part of the *Indian Territory* (whether "Indian *country*" or not) and the sale of it to *any one* (Indian or white) within that Territory.

The Court of Appeals for the Eighth Circuit held in *United States Express Co.* v. *Friedman*, 191 Fed., 673, *supra* (reaffirmed in *Mosier* v. *United States*, 198 Fed., 54, *supra*), that the General Indian Intercourse Acts did apply in the former Indian Territory at the time of the Enabling Act, and this proposition was recognized by the court below (Rec., pp. 9–10).

(1) Nothing in the title of the Indian Territory Prohibition Act ("An Act to provide for the appointment of additional judges of the United States Court in the Indian Territory, and for other purposes") and nothing in the language of that act contains any affirmative indication of any purpose to repeal, as to the Indian Territory, the general laws of the United States covering liquor traffic with the Indians.

(2) On the contrary, the repealing clause seems to have affirmatively disclaimed any such purpose:

> SECTION 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

This was in 1895, and must have had in view the General Indian Intercourse Acts then represented by R. S. 2139 as amended by the act of 1892.

And when later the act of 1897 was passed in this series of general statutes covering the intercourse with the Indians, it, in turn, refrained from any expression of an intention to repeal or affect the act of 1895. It did not contain even the usual provision for repeal of acts inconsistent with itself, but limited its repeal as follows:

> SEC. 2. That so much of *the act of the twenty-third of July, 1892* [Appendix, p. II], as is inconsistent with the provisions of this act is hereby repealed. (Appendix, p. IV; italics ours).

(3) Unless, then, the two lines of statutes are so repugnant to each other that they can not possibly stand together ("in irreconcilable conflict," *Petri* v. *Creelman Lumber Co.*, 199 U. S., 487, p. 497), there is no basis for implying any repeal.

But here the claim is not that they are *repugnant* but that they are *duplicate*. They are deemed to be not *in*consistent but *too* consistent.

C., M. & St. P. Ry. Co. v. *U. S.*, 127 U. S., 406, *supra*, which decides the First Point made in this brief, also decides this Point in principle, though it was not a penal case.

The Schooner Industry, 1 Gall., 114, decided by Mr. Justice Story, is closely in point. That was a proceeding for forfeiture under section 50 of the statute which forbade unloading a vessel *in the night time* under penalty of forfeiting *both goods and*

ship. Section 27 of the same statute forbade the unloading of any vessels at *any time* before arriving at the point of destination and provided for forfeiture of the *goods alone*. It was held that a ship unloading in the night time before arrival at the port of destination violated section 50 despite the fact that section 27 also would apply. Mr. Justice Story said:

> If the wording of both sections clearly embraced the same case, which is to be held nugatory? I know of no principle of law that would enable me to reject either. If, therefore, it should be proved that the 50th section might embrace some cases (for clearly it can not reach all) within the prohibitions of the 27th section, I am not aware how I would get over the expressed language. I should be obliged to hold the forfeiture cumulative in such cases unless the legislature had enabled me, by direct or constructive exceptions, to escape from such a conclusion (p. 116).

Accord: *The John C. Brooks*, 3 Ware, 273 (U.S.C.C.).

Again, in *Wood* v. *United States*, 16 Pet., 342, 362, Mr. Justice Story applied the same rule, stating it in a form which has become the classic statement:

> That it has not been expressly, or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be

> merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy.

Bishop in his work on *Statutory Crimes*, third edition, section 160, puts the rule as follows:

> If the legislature did intend the new enactment to be a substitute for the old law, and if it expressed such intention, or if it employed language inconsistent with any other conclusion, such legislative intent must, all concede, be carried into effect by interpretation. But our jurisprudence is full of instances in which two or a dozen distinct laws cover one question, or cluster of facts, and all stand together, parties having their election on which one to proceed. If the legislature says that its statute is a revision of the whole subject, and meant to be a repeal of all prior laws relating thereto, no court will hesitate to give it this effect. But if, instead of saying this, it simply enacts what is consistent with the prior law, or reenacts such law, how can a court know that it meant what it does not say, a repeal of laws which may subsist with those which it establishes? Hence, in principle, and equally on the better American authorities and on the English, the just doctrine is that, without exception, a statute in affirmative terms, with no intimation of an intent to repeal prior laws, does not repeal them,

unless the new and the old are irreconcilably in conflict.

Judge (now Mr. Justice) Van Devanter collected and analyzed the cases on this general subject in his opinion written for the Circuit Court of Appeals for the Eighth Circuit, in *Great Northern Railway Co.* v. *United States*, 155 Fed., 945, 948–958, and his conclusion supports our position.

See also *McChord* v. *L. & N. R. Co.*, 183 U. S., p. 500; *Harford* v. *United States*, 8 Cranch, 109; *Ex parte Yerger*, 8 Wall., 85, p. 105; *United States* v. *Buckles*, 6 Ind. Territory, 319 (as to this act).

Of course it very commonly happens that the same acts are violations of several different statutes, and involve, therefore, several different offenses. Knocking down a policeman may be at once an assault under the local law and an obstruction of the mails under the Federal law. Heike, whose case was recently before this court, was indicted in certain counts for entering sugar by means of false and fraudulent statements, in violation of section 9 of the Customs Administration Act, and in other counts, on the same facts, for making entries of sugar at less than the true weight, in violation of Revised Statutes, section 5445. His codefendant, Gerbracht, was found guilty under both sets of counts, though sentenced on only one. Probably *every* violation of Revised Statutes, section 5445, would be also a violation of the other act, but that does not make the two *repugnant*.

See the matter of multiplicity of crimes in the same physical act discussed in *U. S.* v. *Jones*, 69 Fed., 973, 981 (as to R. S., secs. 5456 and 5460),

and in *U. S.* v. *Bennett*, 17 Blatchford, 357. The *Jones* case has a particularly good passage on it at the page cited.

It might well be that the Indian Territory Prohibition Act operated to create an aggravated degree of the offense created by the General Indian Intercourse Acts, just as robbery, for instance, is an assault committed under peculiar circumstances of aggravation. If that were so, an offender might be convicted under either the simpler or the aggravated form, at the election of the prosecuting power; but a prosecution for either would presumably exempt from prosecution under the other. (*Bishop on Statutory Crimes*, secs. 171, 172.)

This would be in harmony with the principle of the *English Statutory Interpretations Act*, 52 and 53 Vict. C., 63, § 33, in which the rule properly applicable to this case, as we contend, is set forth as follows:

> Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence.

The practice of the Federal trial courts has been to sentence on only one of several counts charging the same acts as different crimes, though conviction stands on all.

(4) Finally, the application to the Indian Territory of the General Indian Intercourse Acts has been twice recognized by Congress since the passage of the Indian Territory Prohibition Act of 1895:

Act of February 28, 1902 (32 Stat. L., 43, section 7, Appendix, p. VI), and

The Indian Appropriation Act of March 2, 1895 (passed on the very next day after this Indian Territory Prohibition Act), in which occurs the following paragraph (27 Stat. L., at p. 260):

> That section twenty-one hundred and thirty-nine of the Revised Statutes of the United States, as amended by the act of July twenty-third, eighteen hundred and ninety-two (Twenty-seventh Statutes, two hundred and sixty), be, and the same is hereby, extended over and made applicable to the town and town site of Miami in the Indian Territory; and the United States courts of said Territory shall have full jurisdiction thereof.

But as we have said in the First Point, all this is really immaterial, because at most the Indian Territory Prohibition Act merely created an exception, which was wiped out by the Enabling Act.

THIRD POINT.

The enabling act did not except the State of Oklahoma from the operation of the general Indian intercourse acts concerning liquor, and those acts are applicable to that State just as they are to every other State in the Union.

Either, then, the general Indian intercourse acts were always applicable to the Indian Territory, notwithstanding the act of March 1, 1895; or an excep-

tion, if made by that act, was eliminated by its repeal.

The question then arises whether the Enabling Act repealed these general provisions as to the State of Oklahoma.

Ex parte Charley Webb, 225 U. S., 663, 676, left this question open, the court explicitly stating that it was "not to be understood as deciding" it (p. 676).

In *Mosier* v. *United States*, 198 Fed., 54, pp. 58–60, the Circuit Court of Appeals for the Eighth Circuit decided it favorably to the Government, affirming a conviction for a violation of the act of January 30, 1897, in the sale of liquor to one Hazel Gray, who was an Indian ward of the Government and a member and resident of the Osage Tribe in Oklahoma. In our view of it, this decision of the Court of Appeals ruled the present case, but the trial court (Record, p. 8) apparently considered it distinguishable because it concerned the Osage Indians and not the Indian Territory. No such distinction was hinted by the Court of Appeals, which, indeed, followed its own ruling in the *Friedman* case (191 Fed., 673), which directly concerned the Indian Territory. There would, it is true, be a distinction between the Osage Reservation and the Indian Territory if the first two points of this brief are unsound, because the Indian Territory Prohibition Act was limited to the Indian Territory and did not affect the Osage Reservation, and therefore it could not have disturbed the application of the General Intercourse Acts to the *Mosier* case, even if it had destroyed their application to

and therefore defeated this case. But this was not the ground taken by the trial court, which was of opinion that prior to the Enabling Act these general acts had been in force even in the Indian Territory. The distinction which the trial court really appeared to have in mind was based on a theory that the *Enabling* Act itself repealed the Intercourse Acts as to the Indian Territory though not as to the Osage Indians (the *Mosier* case). This, however, can not be, because the provisions of the enabling act coupled the Osage country and all the other Indian reservations in Oklahoma with the Indian Territory and required the State to establish local prohibition as to them all, and not merely as to the Indian Territory (section 3). If by so doing it excluded the Federal liquor laws from the Indian Territory it must necessarily, by the identical clause, have excluded them also from the Osage and other reservations. So far as any repeal was effected by the enabling act it must have covered all the Indian country in Oklahoma and not merely Indian Territory.

I. The enabling act contained no express repealer, and none of its terms brought about a repeal by implication.

The enabling act contained no express repealing clause, and as it is settled beyond argument that the mere creation of a State does not imply the repeal of the Federal liquor laws as to Indian country and Indian wards of the Government (*Ex parte Charley Webb*, 225 U. S., 663, p. 683, and cases cited), the supposed repeal must be found, if at all, by implica-

tion from the clauses of the enabling act which require the State to enforce local prohibition for 21 years throughout the old Indian Territory and the other reservations as they existed on January 1, 1906.

Considering not merely the elementary general rule that repeals by implication are not favored and are found only in cases of the plainest repugnancy, and where the two acts are in "irreconcilable conflict" (*Petri* v. *Creelman Lumber Co.*, 199 U. S., 487, p. 497), but also the obligations of the United States to these Indians under the treaties which this court collected and reviewed in the *Charley Webb* case (225 U. S., 663, at pp. 684–5), and considering the settled rule that no act of Congress is to be construed to abdicate these obligations "unless such a construction be unavoidable" (*Frost* v. *Wenie*, 157 U. S., 46, p. 59), and considering the further settled rule that the laws are to be construed most favorably to the Indians (*U. S.* v. *Celestine*, 215 U. S., 278), no basis exists for implying such a repeal.

Of course the federal Indian liquor acts are not "repugnant" to or in "irreconcilable conflict with" local prohibition. On the contrary, the two are by very definition harmonious auxiliaries.

The theory of Congress in requiring the State to enforce this prohibition is plain enough in the light of the situation as it existed and the decisions of this court. It had entered upon a policy of disintegrating the Indian tribes and dividing their lands among them. This was bound gradually to change the Indian Territory and the Osage and other Indian res-

ervations from solid "Indian country" into a patchwork of "Indian country" and white country, with a corresponding confusion of settlers. Obviously it was highly desirable for the protection of the Indians and their property during the transition to keep liquor out of the whole patchwork and not merely out of those particular pieces which would be technically Indian country under the line of decisions represented by *Bates* v. *Clark* (95 U. S., 204).

Yet for the Federal Government to do this, while undoubtedly constitutional (*U. S.* v. *43 Gallons of Whisky*, 93 U. S., 188), as incidental to the due protection of the Indians, would involve an interference with the local whites and a Federal police administration of large sections of the State, which would be abnormal, contrary to the precedents of Congress (*McBratney* v. *U. S.*, 104 U. S., 621; *Draper* v. *U. S.*, 164 U. S., 240) and very difficult and troublesome of operation. This is the reason why on the argument of the *Charley Webb* case the Government conceded the repeal of the local features of the Indian Territory prohibition act. There was no sufficient basis for an inference that Congress intended so unusual an encroachment on the State power to control its own police. The contrary would have been to make the State of Oklahoma as exceptional among States in one direction as the defendant now claims it is in the other direction.

It is true that the theoretically artistic way to define the State's cooperation would have been to

require it only to keep liquor off the white lands and away from the neighboring whites, leaving it to the Federal Government exclusively to keep it off the intervening Indian lands and away from the Indians; but such an arrangement, though neat in appearance, would have been quite impracticable from the point of view of administration, and far less effective than the blanket method which Congress adopted.

Therefore Congress imposed a duty (*Coyle* v. *Oklahoma*, 221 U. S., 559; *Ex parte Charley Webb*, 225 U. S., p. 670) on the State to conform its local administration to the needs of the Indians for 21 years, which was the expected term of the process of disintegration.

How can it be that such a purpose is so "repugnant" to and "irreconcilable with" the continuance of the peculiar Federal jurisdiction over the Government's Indian wards, as to indicate a purpose to differentiate the State of Oklahoma from every other State in the Union and to abdicate *in that State alone* the Government's treaty obligations and its plain duties to its wards?

II. The general Indian Intercourse Acts were "general laws of the United States not locally inapplicable" to Oklahoma within section 21 of the enabling act and were therefore saved.

This section provides that—

> The laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

Of course it has never been held or claimed that the Indian liquor laws are "locally inapplicable" to prohibition States, and the mere existence of the prohibition clause in the constitution of Oklahoma can not make those laws "inapplicable" to it.

Nor do any of the physical conditions in Oklahoma surrounding the Indians and affecting their lands differentiate that State from the other States, excepting, indeed, that the unusual number of the Indians there and the immense value of their lands give even greater occasion for the Federal jurisdiction than exists in the other States.

III. The proviso of the first section of the enabling act affirmatively indicates the purpose of the United States to continue the operation of these laws.

This proviso is as follows:

> *Provided*, That nothing contained in the said constitution [of Oklahoma] shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed. (34 Stat., 267.)

This proviso was a controlling consideration in the reasoning of this court in the *Webb* case, where the court put it as follows:

> In addition, there is the proviso contained in section one of the act, that nothing con-

tained in the State constitution shall be construed "to limit or affect the right or authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma if necessity requires. This, we think, is an inadmissible construction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the Territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congresses the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the Government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative

a purpose to repeal by implication the existing laws and regulations on the subject. (225 U. S., 682–683.)

CONCLUSION.

The judgment should be reversed.

WINFRED T. DENISON,
Assistant Attorney General.

MARCH 20, 1913.

APPENDIX.—STATUTES.

THE STATUTES CONCERNED.

I.

THE GENERAL INDIAN INTERCOURSE ACTS CONCERNING LIQUOR.

R. S., sec. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person [*except an Indian, in the Indian country*],[1] who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department.

[1] This clause was in the first edition of the Revised Statutes but was struck out by the amendments of 1877—19 Stat., 244.

ACT OF JULY 23, 1892 (27 STAT., 260).[1]

CHAP. 234. AN ACT To amend sections twenty-one hundred and thirty-nine, twenty-one hundred and forty, and twenty-one hundred and forty-one of the Revised Statutes touching the sale of intoxicants in the Indian country, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-one hundred and thirty-nine of the Revised Statutes be amended and reenacted so as to read as follows:

"SEC. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian Superintendent or agent or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. *All complaints*[1] for the arrest of

[1] This act amended section 2139 (1) by enlarging the description of the liquors so as to include ale, beer, etc., and (2) by adding the passage beginning with the words "All complaints," which we have italicized in the text, and which define venue, etc., especially in the Indian Territory.

any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

ACT OF JANUARY 30, 1897 (29 STAT. 506).[1]

CHAP. 109. AN ACT TO prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That any person who shall sell, give away,

[1] This act (1) further enlarged the definition of the liquors, (2) enlarged the definition of the Indians, especially so as to cover allottees in trust, and all under guardianship (3) changed the punishment, and (4) did not repeat the venue provisions added by the act of 1902, although leaving them still standing by limiting the repeal of that act to the provisions which were "inconsistent." (Sec. 2.)

dispose of, exchange, or barter any malt, spirituous, vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

SEC. 2. That so much of the act of the twenty-third of July, 1892, as is inconsistent with the provisions of this act is hereby repealed.

II.

INDIAN TERRITORY ACT OF MARCH 1, 1895 (28 Stat., 693).[1]

CHAP. 145. An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes.

Section 1 [divides the Indian Territory "now within the jurisdiction of the United States court in said Territory" into three judicial districts].

Section 2 [provides for "two additional judges of the United States court in said Indian Territory" and for an attorney, marshal, and deputy marshals].

Section 3 [provides for clerks and deputies].

Section 4 [provides for commissioners and extends certain portions of the Arkansas Criminal Law and Procedure to the Indian Territory. This section also provides for appeals].

Section 5 [provides for constables].

Section 6 [provides for jurors].

Section 7 [provides for venue].

SEC. 8. That any person, whether an Indian or otherwise, who shall, in said Territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such

[1] The prior history of this line of legislation is given in the footnote to the act of March 1, 1889, in I Supplement to the Revised Statutes, Vol. I, second edition, p. 670.

manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years. (28 Stat., 697.)

Section 9 [provides as to the exclusive jurisdiction of the United States court in the Indian Territory and repeals the jurisdiction theretofore had by the United States courts in Arkansas, Kansas, and Texas over offenses committed in the Indian Territory.]

Section 10 [provides for court rooms in the custody of prisons].

Section 11 [provides for a court of appeals made up of the several district judges].

Section 12 [provides for fees to officials].

Section 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

III.

ACT OF FEBRUARY 28, 1902 (32 STAT. L., 43).

CHAP. 134. AN ACT TO grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid & Anadarko Railroad Company, and for other purposes.

Be it enacted * * *

Section 7. That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed

to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

IV.

THE OKLAHOMA ENABLING ACT OF JUNE 16, 1906 (34 STAT., 267).

CHAP. 3335. AN ACT TO enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

Section 2 [provides for a constitutional convention and the qualifications of voting for delegates, etc.]

Section 3. That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and, after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship, and that polygamous or plural marriages are forever prohibited.

Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of

said constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: *Provided*, That the legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturized by some process approved by the United State Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required

of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which, after his own personal diagnosis, he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim

all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Section 21 [after providing for the election of State officers and that Osage Reservation should be a separate county, etc., proceeds:] * * * And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

Section 22. That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act.[1]

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[1] The act then proceeds with the provisions for Arizona and New Mexico.

It contains no repealer.

V.

SCHEDULE OF PUNISHMENTS IMPOSED BY THE VARIOUS ACTS.

	Fine.		Imprisonment.	
	Minimum.	Maximum.	Minimum.	Maximum.
R. S. 2139	.....	$300	.....	2 years.
Act of 1892	.....	$300	.....	2 years.
Act of 1897	$100 (first offense).. $200 (later).	.....	60 days....	.....
Ind. Ter. act 1895	.....	$500	1 month....	5 years.
Oklahoma enabling act 1906.	$50	.....	30 days....	.....

[1] Committed until paid.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

No. 918.

In the

Supreme Court of the United States

October Term, 1912.

THE UNITED STATES, *Plaintiff in Error,*

vs.

BUD WRIGHT.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

Brief of Defendant in Error

JAMES C. DENTON,
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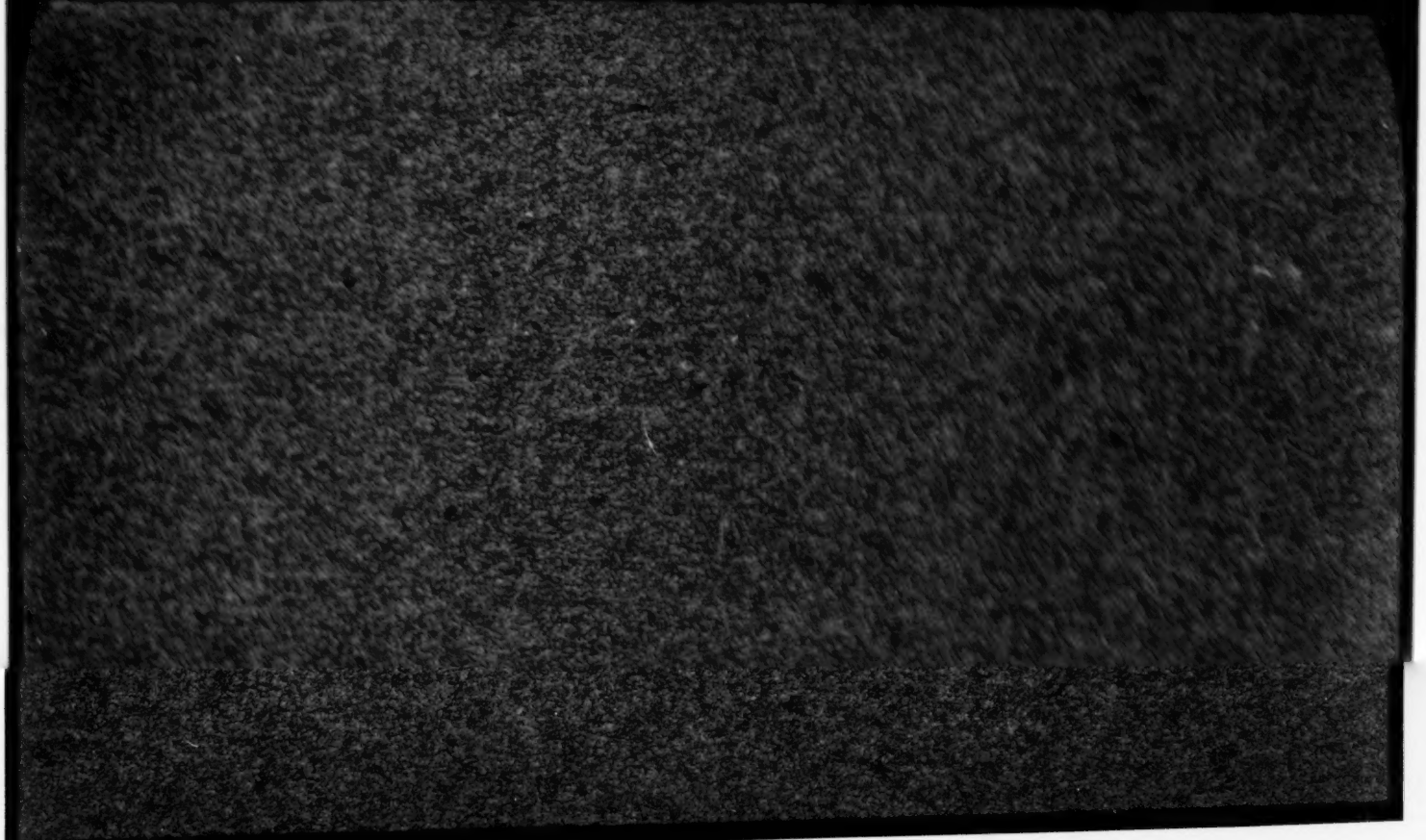

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PROPOSITION 2.—The Act of March 1, 1895 (28 Stat. 693), was superseded or repealed *in toto* by the Act of January 30, 1897 (29 Stat. 506), and by the Oklahoma Enabling Act (34 Stat. 267), and by the admission on November 16, 1907, of Indian Territory into the Union as a part of the State of Oklahoma 14

PROPOSITION 3.—Even assuming, for the sake of the argument, that that part of Sec. 8 of the Act of March 1, 1895 (28 Stat. 693), which prohibits interstate shipments of intoxicating liquors into the Indian Territory, was not repealed by the Act of January 30, 1897 (29 Stat. 506), or by the Oklahoma Enabling Act, or by the admission of Indian Territory into the Union as a part of the State of Oklahoma, still the allegations of the indictment are not sufficient to charge the defendant with a violation of this Section..... 26

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

No. 918.

THE UNITED STATES, *Plaintiff in Error,*

vs.

BOB WRIGHT.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

STATEMENT *of the* CASE

This case involves the sufficiency of an indictment filed in the United States District Court for the Eastern District of Oklahoma on May 3rd, 1912, in which it is charged that the defendant in error, Bob Wright (hereinafter called the defendant), unlawfully introduced one quart of intoxicating liquor or whiskey into the County of Muskogee, State of

Oklahoma, the said county then and there being a part of the Indian country of the United States (p. 1 of Transcript). The defendant filed a demurrer to the indictment on the ground that it does not charge him with an offense against the laws of the United States (p. 2 of Transcript). The District Court, in accordance with a written opinion (p. 2 of Transcript), sustained the demurrer, dismissed the case and discharged the defendant (p. 2 of Transcript). To reverse this judgment, the United States has taken a writ of error from the District Court to this honorable court (p. 17 of Transcript).

SPECIFICATION *of* ERRORS

The assignment of errors of the United States is found at page 12 of the transcript of the record. Although the assignment specifies eleven alleged errors, all of the alleged errors relied upon relate to and arise out of the action of the District Court in sustaining the defendant's demurrer to the indictment. Since the ground of the demurrer is that the indictment does not charge the defendant with a crime against the laws of the United States, a discussion of the action of the trial court in sustaining the demurrer may logically be divided into two questions, *viz.*: *(A)* Is there any law of the United States

against the introduction of intoxicating liquors into the County of Muskogee, State of Oklahoma? And *(B)*, if there is such a law, does the indictment charge the defendant with a violation thereof?

The government's brief does not touch upon question B, whether the indictment is sufficient to charge a violation of the statute deemed to be in force. With regard to question A, it is, we think, practically conceded by the United States that there is no federal statute prohibiting the introduction of intoxicating liquor into the County of Muskogee, in the State of Oklahoma, unless it be either the Act of Congress of March 1, 1895 (28 Stat. 693), or Sec. 2139 of the Revised Statutes of the United States, as amended by the Act of July 23, 1892 (27 Stat. 260), and by the Act of January 30, 1897 (29 Stat. 506). Hence, for the purposes of this argument, we shall discuss the above questions A and B under the following subdivisions, to-wit:

1. Sec. 2139 of the Revised Statutes of the United States, as amended by the Act of July 23, 1892 (27 Stat. 260), was superseded or repealed as to Indian Territory by Sec. 8 of the Act of March 1, 1895 (28 Stat. 693).

2. The Act of March 1, 1895 (28 Stat. 693), was superseded or repealed *in toto* by the Act of January 30, 1897 (29 Stat. 506), and by the Oklahoma Enabling Act (34 Stat. 267), and by the

admission on November 16, 1907, of Indian Territory into the Union as a part of the State of Oklahoma.

3. Even assuming, for the sake of the argument, that that part of Sec. 8 of the Act of March 1, 1895 (28 Stat. 693), which prohibits *interstate* shipments of intoxicating liquor into the Indian Territory was not repealed by the Act of January 30, 1897 (29 Stat. 506), or by the Oklahoma Enabling Act, or by the admission of Indian Territory into the Union as a part of the State of Oklahoma, still the allegations of the indictment are not sufficient to charge the defendant with a violation of said Section.

4. Assuming further, for the sake of the argument, that the Act of January 30, 1897 (29 Stat. 506), has been in full force and effect in the State of Oklahoma since its admission into the Union on November 16, 1907, the allegations of the indictment are not sufficient to charge the defendant with a violation thereof.

ARGUMENT

***1.* Section 2139 of the Revised Statutes of the United States, as amended by the Act of July 23, 1892 (27 Stat. 260), was superseded or repealed as to Indian Territory by Sec. 8 of the Act of March 1, 1895 (28 Stat. 693).**

Sec. 2139 of the Revised Statutes was originally Sec. 4 of the Act of July 9, 1832 (4 Stat. 564). It next became a part of Sec. 20 of the Act of June 30, 1834 (4 Stat. 732); and the latter Act was in turn amended by the Act of Feb. 27, 1877 (19 Stat. 244), before being incorporated in the Revised Statutes as Sec. 2139. Later said Section was amended and reenacted by the Act of July 23, 1892 (27 Stat. 260), entitled, "An Act to Amend Sections Twenty-one Hundred and Thirty-nine, Twenty-one Hundred and Forty and Twenty-one Hundred and Forty-one of the Revised Statutes, Touching the Sale of Intoxicants in the Indian Country, and for Other Purposes." Thus the 1892 Act superseded Sec. 2139, and was the general Indian intercourse act, touching the sale to Indians, and the introduction into the Indian country, of intoxicating liquors, applicable to Indian Territory as defined by the Act of May 2, 1890 (26 Stat. 81). That the 1892 Act became effective in Indian Territory after its passage, will not be questioned, we presume, because the lands of the Five Civilized Tribes of Indians comprising that terri-

tory were then Indian country, being held by the tribes in common under the Indian title. *American Fur Co.* v. *United States,* 2 Pet. 358; *Bates* v. *Clark,* 95 U. S. 204; and *Clairmont* v. *United States,* 225 U. S. 551. Furthermore, the provisions in the latter part of the 1892 Act, prescribing the venue of complaints for violations thereof in Indian Territory, are conclusive that the Act became immediately effective there.

Notwithstanding the 1892 Act covered the subject of the introduction and sale of intoxicating liquors in Indian country, and applied to Indian Territory because it was Indian country, Congress passed the Act of March 1, 1895 (28 Stat. 693), Sec. 8 of which prohibited the introduction and sale of intoxicating liquors in Indian Territory. It is contended by the defendant that the 1895 Act, being a special act applicable to Indian Territory by name, and covering the general subject of the introduction and sale of intoxicating liquors, superseded as to that territory the 1892 Act, which was the existing general statute against the introduction and sale of such liquors in Indian country. This proposition is in conflict with the Second Point made in the brief of the government (see page 6 thereof); yet it is in accord with the first ground relied on by the petitioner in *Ex parte Webb,* 225 U. S. 663 *(Id.* p. 674). And, moreover, the proposition was assumed (but not conceded) to be well taken by this Court in the *Webb* case *(Id.* p. 675).

It is a general rule of statutory construction that the legislative meaning is to be extracted from the consideration of a statute as a whole. *Holden* v. *Stratton,* 198 U. S. 202; *Heydenfeldt* v. *Daney Gold, etc., Min. Co.,* 93 U. S. 634, 638, and *Kohlsaat* v. *Murphy,* 96 U. S. 153, 159. Applying this rule we find that the purpose of the 1895 Act, as a whole, according to its title and context, was primarily to change the judicial system in Indian Territory.

The Act is entitled, "An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory, and for Other Purposes," and contains thirteen sections. Sec. 1 divided Indian Territory into three judicial districts. Sec. 2 provided for two additional judges, etc. Sec. 3 provided for clerks and deputies of said court. Sec. 4 provided for United States commissioners, extended certain portions of the Arkansas criminal law and procedure to the Indian Territory, and provided for appeals. Sec. 5 provided for constables. Sec. 6 provided for jurors. Sec. 7 provided the venue of all criminal and civil suits, of which the United States Court in Indian Territory had jurisdiction. Sec. 8 provided:

> "That any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or

who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

Sec. 9 gave the United States Court in Indian Territory exclusive original jurisdiction in both civil and criminal cases, and repealed the jurisdiction theretofore exercised by the United States Courts in Arkansas, Kansas and Texas over actions arising in Indian Territory. Sec. 10 provided for court rooms and for the custody of prisoners. Sec. 11 provided for the Indian Territory Court of Appeals. Sec. 12 provided for fees to officials. Sec. 13 is a repealing clause, which provided:

> "That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said territory."

In construing a statute, the existing law, the history of the times and the circumstances existing at the time of its enactment are to be considered.

Welch v. *Cook*, 97 U. S. 541, 543; *The Delaware*, 161 U. S. 459, 472; *Hamilton* v. *Rathbone*, 175 U. S. 414; and *Dewey* v. *United States*, 178 U. S. 510, 520.

The 1895 Act was introduced by Senator Teller of Colorado, who was chairman of the special Senate Indian committee that went to the Indian Territory expressly to inquire into conditions there with a view of recommending legislation for that territory. Vol. 27, part 2, Cong. Rec., p. 950. Thus the Act was the result of the investigation made by the special Senate Indian committee and was plainly intended to supplant and supersede all other laws in force in said Indian Territory, which were in any manner in conflict or inconsistent therewith.

Also the history of a statute from the time it is introduced until it is finally passed may be referred to as an aid to its construction. *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1. The discussion of the 1895 Act in Congress assumed a wide range, the predominating idea throughout being to provide a temporary and provisional law which would meet the needs of Indian Territory during the period of time which must elapse before it could be admitted into the Union. It is quite plain, however, from the discussion, that the 1895 Act was merely a temporary act designed to meet the exigencies of the existing situation and that it would not, if passed, interfere with, or delay, in any manner, the admission of the territory into the Union as a state, according to the policy inaugurated by Sec. 16 of the

Act of March 3, 1893 (27 Stat. 645). Vol. 27, part 2, Cong. Rec., pp. 948, 954.

The debate in Congress on the 1892 Act also shows that Congress was aware that that Act, and other sections of the Revised Statutes relating to Indian country and covering the sale of intoxicating liquors, would cease to be operative in Indian Territory when the form of government was changed, or when a special act on prohibition applicable to Indian Territory should be passed. See Vol. 23, part 3, Cong. Rec., p. 2250.

Thus considering the 1895 Act as a whole, together with the existing law, the history of the times, the circumstances existing at the time of its enactment, the legislative history of the Act from the time it was introduced until it was passed, and its reason, purpose and object, we are forced to conclude that it was a temporary, provisional and special act designed by Congress to cover the conditions existing in Indian Territory in 1895, and that it superseded, or took the place of, all other general or special statutes of the United States applicable to Indian Territory, to the extent that it was inconsistent therewith.

Turning to Sec. 8 of the Act, we find that it prohibited the introduction into Indian Territory of intoxicating liquors; and also prohibited the sale in said territory of any such liquors to any person, whether an Indian or not. The 1892 Act merely pro-

hibited the sale of such liquors to Indians, and not to white persons. So far as the character of liquors prohibited, the 1892 Act embraced "any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind," while the 1895 Act embraced "any vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not." Thus the enumeration of the 1895 Act is as comprehensive as, and possibly more so than, that contained in the 1892 Act. Also, the ~~minimum~~ maximum punishment under the 1892 Act was three hundred dollars fine and two years' imprisonment, while the maximum punishment provided for in the 1895 Act was a five hundred dollar fine and five years' imprisonment, with a minimum imprisonment of one month. Thus the 1895 Act increased the maximum punishment and prescribed a minimum punishment. It will be observed, therefore, that Sec. 8 of the 1895 Act, which was a special act applying to Indian Territory by name, embraced every offense included within the 1892 Act, which was a general act relating to Indian country; that the 1895 Act, in addition, made sales to persons who are not Indians an offense, and increased the maximum punishment and established a minimum punishment; and that both Acts related to the general subject of the sale and introduction of intoxicating liquors.

If the 1892 Act applied to Indian Territory for the reason that it was Indian country, what was the reason, purpose or object of Congress in placing

Sec. 8 in the 1895 Act relating to Indian Territory? In counsel's opinion, there are two reasons for this: *(1)* The Act was a territorial act relating to Indian Territory only, and because of the unusual conditions found to exist in Indian Territory by the special Senate Indian committee, Congress desired to give the territorial courts jurisdiction of sales to persons, whether Indian or not, and to increase the punishment in the Indian Territory for the introduction and sale of intoxicating liquors; and *(2)* Congress desired to protect Indian Territory against the introduction and sale of intoxicating liquors, after the 1892 Act should become inoperative there by reason of the extinguishment of the Indian title through the allotment of the lands in severalty. Prior to the General Allotment Act of February 8, 1887 (24 Stat. 388), all Indian lands were held in common by the Indian tribes. But soon thereafter, it was questioned whether Sec. 2139 of the Revised Statutes, as amended by the 1892 Act, would apply to an Indian allottee and his allotment under the 1887 Act, for the reason that by allotment thereunder the individual Indian would become a citizen of the United States, and his allotment would cease to be Indian country by virtue of the Indian title having been extinguished. Beginning with the Act of March 3, 1893 (27 Stat. 646), Congress began to enact legislation looking toward the immediate allotment in severalty of all lands within the Indian Territory,

and towards the ultimate creation of a new state out of that territory. The effect of the accomplishment of this purpose would be the same as that under the 1887 Act, in that the lands allotted would cease to be Indian country, and the 1892 Act relating to Indian country would cease to apply, under the decisions of this Court. *Bates* v. *Clark, supra;* and *Ex parte Crow Dog,* 109 U. S. 556. Hence Congress passed Sec. 8 of the 1895 Act in order that the people residing in Indian Territory might not be left without protection against the introduction and sale of intoxicating liquors when the 1892 Act should become inoperative, because of the extinguishment of the Indian title to the lands there through allotment.

The repealing clause found in Sec. 13 of the 1895 Act, hereinbefore set out, supports the conclusion that the 1892 Act was repealed. While the repealing clause is in the negative, it, in substance, means that all laws of the United States, or of the State of Arkansas, which are applicable to Indian Territory, are repealed, to the extent that they are in conflict with the 1895 Act. Therefore, even if the 1892 Act were a special act referring to Indian Territory by name, it would be repealed or superseded as to Indian Territory by the 1895 Act, for the reason that the 1895 Act is a subsequent special act covering the entire subject of the introduction and sale of intoxicating liquors in Indian Territory. Therefore, the 1895 Act superseded and repealed the 1892

Act as to Indian Territory under the general rule, that although the later act does not specifically refer to prior acts, but declares that all laws in conflict therewith are repealed, if it comprehend and be variant from the prior act, the legislature must be assumed to intend it as a substitute for and a repeal of the prior act. *Hess* v. *Reynolds*, 113 U. S. 73, 79; *United States* v. *Auffmordt* 122 U. S. 197, 208; *Fisk* v. *Henarie*, 142 U. S. 459; *Tom Hong* v. *United States*, 193 U. S. 517; *Gibson* v. *United States*, 194 U. S. 182; *Lowe* v. *United States*, 194 U. S. 193, and *Railroad Company* v. *Grant*, 98 U. S. 398, 401.

2. The Act of March 1, 1895 (28 Stat. 693), was superseded or repealed in toto by the Act of January 30, 1897 (29 Stat. 506), and by the Oklahoma Enabling Act (34 Stat. 267), and by the admission on November 16, 1907, of Indian Territory into the Union as a part of the State of Oklahoma.

The Act of January 30, 1897 (29 Stat. 506), is entitled "An Act to Prohibit the Sale of Intoxicating Drinks to Indians, Providing Penalties Therefor and for Other Purposes." Sec. 1 of the Act prohibits the sale, etc., of "any malt, spirituous, vinous liquors, including beer, ale, and wine, or any ardent or other intoxicating liquors of any kind whatsoever or any essence, extract, bitters, preparation, compound composition, or any article whatsoever under any name, label or brand, which produces in-

toxication," to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian or ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed-bloods, over whom the government, through its departments, exercises guardianship; and also prohibits the introduction of any such liquors into the "Indian country," which term is enlarged to include Indian allotments of the character above defined. The minimum punishment is one hundred dollars fine for the first offense and two hundred dollars fine thereafter, and sixty days' imprisonment; there being no maximum punishment, either of fine or imprisonment, prescribed by the Act. Sec. 2 of the Act provides "that so much of the Act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this Act is hereby repealed."

It is contended by the defendant that the 1897 Act, *supra*, superseded or repealed the Act of March 1, 1895. With regard to this question, the Supreme Court in the case of *Ex parte Webb*, 225 U. S. 663, at p. 676 of the opinion, say:

> "The question whether the act of 1895 was superseded by the act of 1897 was not much discussed in the argument. It is a question of nicety, having an importance extending beyond the exigencies of the present case. In the view we take of the other questions, however, we may simplify the discussion by assum-

ing (without conceding) that petitioner's first two points are well taken, and that the act of 1897 did not apply to the Indian Territory because that territory was covered by the special act of 1895."

While the contrary of this contention was assumed by this court in the *Webb* case, *supra*, counsel insists that, in view of the language of the court above quoted, the question cannot be said to be decided by that case, and is still open for determination by this court.

A comparison of the 1897 Act with the Act of 1895 shows that the two acts, as to the character of the liquors prohibited, are substantially the same, except that the 1897 Act may be said to be broader and more comprehensive in that respect. With respect to the *introduction* of intoxicating liquors in Indian Territory, however, the 1897 Act is as comprehensive as the 1895 Act, because in 1897 all the lands in Indian Territory, being held under the Indian title at that time, were Indian country within the meaning of the 1897 Act. The latter Act also increased the punishment for a violation thereof by providing a minimum fine of one hundred dollars for the first offense and two hundred dollars for later offenses, and a minimum imprisonment of sixty days; and also removed the maximum fine and the maximum imprisonment. The 1897 Act was a general law on the subject of intoxicating liquors, while the

1895 Act was a prior, temporary, provisional and special act on the same subject. Now while it is a rule of statutory construction that a statute, general in its terms and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute *(Ex parte Crow Dog, supra; United States* v. *Nix,* 189 U. S. 199, 205); or, in other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general, creates a presumption that the special is to be considered as remaining an exception to the general *(Rodgers* v. *United States,* 185 U. S. 83, 87; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 397); one as the general law of the land, the other as the law of the particular case *(State* v. *Stoll,* 17 Wall. 425). Yet, it is also a canon of statutory construction that a prior special law, which is merely temporary and provisional, is repealed by a subsequent perpetual law intended as a complete system of government. *Eckloff* v. *District of Columbia,* 135 U. S. 240; and *District of Columbia* v. *Hutton,* 143 U. S. 18. Applying this rule, counsel respectfully insists that the 1897 Act had the effect of repealing the Act of 1895 *in toto.*

Under proposition 1, *supra,* we saw that Sec. 8 of the 1895 Act was passed mainly for two purposes: *(1)* To prohibit the introduction and sale of intoxicating liquors in Indian Territory after the

1892 Act ceased to be applicable by reason of the extinguishment of the Indian title to the lands of the Five Civilized Tribes through allotment in severalty; and *(2)* to meet the temporary conditions existing in Indian Territory as ascertained by the special Senate Indian committee. Now the 1897 Act, by enlarging the definition of Indian country to include certain classes of Indian allotments in severalty, eliminated the necessity of the 1895 Act in Indian Territory, because the contingency of the lands there ceasing to be Indian country after their allotment in severalty was fully provided against, not only during territorial days, but even after the admission of the lands into the Union as a state. Also, the 1897 Act may be said better to meet the temporary conditions found to exist in Indian Territory by the special Senate Indian committee, than the 1895 Act, because the punishment for introductions of intoxicating liquor is increased by providing a minimum fine of one hundred dollars for the first offense, and two hundred dollars for later offenses, and a minimum imprisonment of sixty days, and by removing the maximum fine and imprisonment. It is noteworthy, therefore, that the 1897 Act, at the time of its passage, covered the special conditions in Indian Territory which made the 1895 Act necessary, by providing that lands after allotment in severalty should continue to be and remain Indian country within the purview of the Act, and by enlarging the class of liquors pro-

hibited, and by increasing the punishment for violations thereof.

Sec. 2 of the 1897 Act, which is the repealing clause, refers specifically to the 1892 Act, and repeals so much of that act as is inconsistent with the 1897 Act. The plain import of this repealing clause is that that part of the 1892 Act, which is consistent with, and is not covered by, the 1897 Act is retained in force. Hence, those special provisions of the 1892 Act relating to and governing questions of venue of complaints for the introduction and sale of intoxicating liquor in Indian Territory are expressly retained or re-enacted. Since the 1897 Act is a complete revision of the subject of the sale of intoxicating liquors to Indians and their introduction into Indian country, it might be said, unless a contrary intention appeared, to repeal all prior acts on that subject. *United States* v. *Ranlett,* 172 U. S. 133, 140. Certainly no repealing clause was necessary in the 1897 Act to repeal that part of the Act of 1892 which was inconsistent therewith. *Henderson's Tobacco,* 11 Wall. 652, 657; and *Henrietta, etc., Min. Co.* v. *Gardner,* 173 U. S. 123, 128. Thus the repealing clause tends to show that it was the intention of Congress that the 1897 Act, together with the special provisions of the 1892 Act governing the venue of complaints in Indian Territory, should constitute a general law dealing with the introduction and sale of intoxicating liquors in Indian country, and that it should apply in Indian

Territory. Therefore, the 1895 Act must have been repealed by the 1897 Act, since the latter Act in no way reserves the former act in force, and since the 1897 Act is a complete revision of the subject of the sale to Indians, and of the introduction in the Indian country, of intoxicating liquors. *Cook County National Bank* v. *United States,* 107 U. S. 445, 451; *Murphy* v. *Utter,* 186 U. S. 95, 105; *The Paquete Habana,* 175 U. S. 677, 685; *United States* v. *Rider,* 163 U. S. 132, 140; and *Indiana Mfg. Co.* v. *Kochne,* 188 U. S. 681.

Again we wish to emphasize the fact that, at the time of the passage of the 1897 Act, all lands in Indian Territory were still Indian country, and that no allotments in severalty had been made in any of the Five Civilized Tribes, and that no act of Congress had yet been passed authorizing the allotment in severalty of any of the lands of either of the Five Civilized Tribes. Hence, the prohibition of the 1897 Act, with respect to the sale and introduction of intoxicating liquors, was as broad and comprehensive as to Indian Territory as if the 1897 Act had been made to refer to Indian Territory by name.

The subsequent legislation of Congress, relating to Indian Territory and dealing with the subject of intoxicating liquors, supports the contention that the intention of Congress, by the 1897 Act, was to repeal the 1895 Act.

The Act of February 28, 1902 (32 Stat. 43), is a special act authorizing the granting of rights-of-

way through the Oklahoma Territory and the Indian Territory to the Enid & Anadarko Railroad Company. Sec. 7 of the act, provides that officers, etc., of the railroad company, necessary to the construction and management of said road, shall be allowed to reside, while so engaged, upon such right-of-way, but "subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws." Clearly, this Section refers to the 1897 Act alone, and not to the Act of 1895, and tends to show that Congress at that time believed the 1897 Act in force throughout Indian Territory. The reason, too, for expressly reserving the 1897 Act in force as to rights-of-way in the Indian Territory, was that the definition of Indian country, even as enlarged in the 1897 Act, would not include lands granted to railroads as rights-of-way. Furthermore, if the 1895 Act were in force in Indian Territory at that time, the entire Sec. 7 of the Act of February 28, 1902, was entirely unnecessary, because both the introduction and the sale of intoxicating liquors on rights-of-way, as well as on all other lands in Indian Territory, were fully covered by the 1895 Act. The only way, therefore, that Sec. 7 of the 1902 Act can be given any force and effect, is on the theory that Congress believed the 1895 Act had been repealed by the 1897 Act, and thus expressly made rights-of-way in Indian Territory subject to the lat-

Act, because the same was not embraced within the the definition of Indian country contained therein. Accordingly, Sec. 7 of the Act of February 28, 1902, *supra,* amounts practically to a legislative construction by Congress that the 1897 Act, and not the Act of 1895, was in force in Indian Territory in 1902. And this construction should be considered in construing the Act. *Cope* v. *Cope,* 137 U. S. 682, 688; *United States* v. *Freeman,* 3 How. 556, 564; *Stockdale* v. *Insurance Co.,* 20 Wall. 323; and *United States* v. *Pitman,* 147 U. S. 669, 671.

The Act of June 16, 1906 (34 Stat. 267), tends to show that if the 1895 Act was not repealed by the 1897 Act, it was repealed after the admission of Oklahoma into the Union. With respect to the effect of the Enabling Act on the 1895 Act, counsel are aware that this Court, in the *Webb case,* at p. 681 of the opinion, say:

> "And the question for present solution is whether the act of 1895, having been partially repealed, as just indicated, remains in force as a prohibition against such interstate traffic,"

and that the application of the petitioner, Webb, was denied on the theory that the 1895 Act remained in force after statehood to prohibit interstate shipments of intoxicating liquors into the Indian Territory part of the State of Oklahoma. The defendant respectfully insists, however, that the Enabling Act supports the conclusion that the 1895 Act was wholly repealed with statehood, if not beforehand.

Considering the Act we find that the proviso of Sec. 1 reads as follows:

> "That nothing contained in the said Contitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

The first part of the proviso merely leaves unimpaired, so far as the State Constitution is concerned, the rights of person and property *pertaining to the Indians.* This limitation is to be only "so long as such rights shall remain unextinguished." The latter part of the proviso simply provides that nothing in said Constitution shall limit or impair the right of the Government to make laws thereafter concerning *the Indians* and their property, the same as if the Enabling Act had not been passed. We do not think that it is a reasonable construction to say that this proviso reserves all prior laws pertaining to the Indians and their property in force. But if that were its effect, the more reasonable construction would be that it retained the existing general statute of 1897 in force, rather than the Act of 1895. Especially does this construction appear the

more reasonable, because the Act of February 28, 1902, *supra*, as well as the various tribal treaties or agreements, all refer in general terms to the general intercourse Act of 1897, rather than to the Act of 1895, when treating of the subject of intoxicating liquors.

Sec. 21 of the Enabling Act, *supra*, provides, in part, that "the laws of the United States not locally inapplicable, shall have the same force and effect within said State as elsewhere within the United States." This language, likewise, refutes the inference, that the 1895 Act, rather than the general statute of 1897, was retained in force after statehood. When it is remembered that the 1895 Act was a temporary territorial Act designed to cover Indian Territory during the period immediately preceding statehood, it would seem that it would require some express enactment of Congress to retain it in force after statehood. *De Lima* v. *Bidwell*, 182 U. S. 1, 197, and *McNulty* v. *Batty*, 10 How. 72. The defendant does not think that Sec. 21, *supra*, can possibly have this effect, for the reason that the term "the laws of the United States," strictly speaking, does not include territorial laws, to which class the 1895 Act belonged. This is made the more apparent, too, by the language which follows to the effect that the laws of the United States referred to "shall have the same force and effect *within said state as elsewhere within the United States.*" If the 1895 Act be one of the

laws of the United States referred to by said Section, then it has the same force and effect throughout the entire State of Oklahoma as it does elsewhere within the United States. In other words, to be given any force and effect whatsoever within the State of Oklahoma, it must be held to be effective throughout the entire state, as well as elsewhere within the United States, under the language of said Section. But, of course, Sec. 8 of the 1895 Act could not by any process of reasoning, if expressly retained in force after statehood, apply to any part of the state except that which was formerly Indian Territory. Hence, the conclusion naturally follows that Sec. 21 of the Enabling Act does not refer to the territorial Act of 1895, which provided a judicial system for Indian Territory, but rather to the general Indian intercourse Act of 1897, which is the law of the United States now in force throughout the State of Oklahoma as elsewhere within the United States. This conclusion obtains, moreover, without regard to whether the 1895 Act and the 1897 Act were both in force up to the admission of Oklahoma into the Union as a state.

3. Even assuming, for the sake of the argument, that that part of Sec. 8 of the Act of March 1, 1895 (28 Stat. 693), which prohibits *interstate* shipments of intoxicating liquor into the Indian Territory was not repealed by the Act of January 30, 1897 (29 Stat. 506), or by the Oklahoma Enabling Act or by the admission of Indian Territory into the Union as a part of the State of Oklahoma, still the allegations of the indictment are not sufficient to charge the defendant with a violation of said section.

The indictment charges that the defendant, on the 19th day of March, in the year one thousand nine hundred and twelve, in the County of Muskogee, and within the Eastern District of the State of Oklahoma, and within the jurisdiction of the District Court of the United States for said District, "the said County and District then and there being a portion of the Indian country of the said United States, did at the time and place aforesaid unlawfully, wilfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent and intoxicating liquor, to-wit, whiskey, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States of America" (p. 1 of Transcript). The ground of the demurrer is that the indictment does not charge the defendant with an offense against the laws of the United States (p. 2 of Transcript). The point made at the argument on the demurrer was that this

Court in *Ex parte Webb*, 225 U. S. 673, had held that the Act of March 1, 1895 (28 Stat. 693), was impliedly repealed by the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267), except so much of the Act as prohibits the carriage of intoxicating liquors *from without the State of Oklahoma* into that part of the same which was formerly Indian Territory; and that one of the material and necessary allegations of an indictment, under the provisions of the 1895 act held not to have been repealed by the Enabling Act, is that the introduction into the Indian Territory part of the State was made *from without* the State of Oklahoma, or from another State in the Union. In other words, the indictment must allege not only that intoxicating liquors were introduced into the Indian Territory part of the State, but also that the introduction was made *from without* the State of Oklahoma, or from some other state in the Union. It will be observed that the indictment in this case does not contain language sufficient to charge the defendant with having made the introduction from without the State of Oklahoma, or from some other state in the Union.

Under the allegations of the indictment, the introduction of the one quart of intoxicating liquor into Muskogee County and the Eastern Judicial District of the State of Oklahoma, could have been made from Oklahoma City, which is located within the old Oklahoma Territory part of the state. This would not be an offense under the 1895

Act, as repealed by the Enabling Act. Hence the indictment is bad and the demurrer should have been sustained. 22 Cyc 335; *United States* v. *Hess*, 124 U. S. 483, 486; *Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Mann*, 95 U. S. 580, 583.

4. Assuming further, for the sake of the argument, that the Act of January 30, 1897 (29 Stat. 506), has been in full force and effect in the State of Oklahoma since its admission into the Union on November 16, 1907, the allegations of the indictment are not sufficient to charge the defendant with a violation thereof.

The proposition assumed here, for the sake of the argument, is the Third Point made in the Government's brief. While the defendant does not concede the proposition here assumed, we wish to say frankly that we have made no argument to the effect that the general Indian Intercourse Act of 1897 does not apply in the State of Oklahoma with the same force and effect as it does in all other states in the Union. Indeed, it is the opinion of counsel that this conclusion is correct, though our duty to our client requires us to contend otherwise here. But, if the 1897 Act be now in force in the State of Oklahoma, does the indictment charge the defendant with a violation of that Act? The indictment does not allege that intoxicating liquor was introduced into any particular part of the County

of Muskogee, in the State of Oklahoma, or that the entire County of Muskogee, or any part thereof, is an Indian allotment the title to which is held in trust by the Government, or which remains inalienable by the allottee without the consent of the United States. In other words, the allegations of the indictment do not bring it within the special features of the 1897 Act extending the definition of Indian country to embrace Indian allotments in severalty of the character above described. Therefore, under the authorities cited under proposition 3, *supra*, the indictment cannot be sustained unless either the County of Muskogee, or the Indian Territory part of the State of Oklahoma is still Indian country within the general meaning of the term as used in the Revised Statutes of the United States and in the Act of 1897.

Indian country, within the meaning of the general statutes of the United States, and especially within the meaning of that term as used in those sections of the Revised Statutes which were originally a part of the Act of June 30, 1834, is lands held by the Indians in common under the Indian title; and when the Indian title is extinguished, such lands, *ipso facto,* cease to be Indian country without an Act of Congress. *Worcester* v. *Georgia,* 6 Pet. 515; *Bates* v. *Clark,* 95 U. S. 204; *Ex parte Crow Dog,* 109 U. S. 561; and *Clairmont* v. *United States,* 225 U. S. 551.

The Court will take judicial notice of the fact that Sec. 14 of the Act of June 28, 1898 (30 Stat. 495), authorizes the incorporation of cities within the Indian Territory, and that the lands in incorporated cities in the Creek Nation of Indians, in which nation the County of Muskogee is situated; were surveyed, platted, appraised and sold to citizens of the United States for cash, pursuant to Sec. 15 of said Act of 1898, and the Act of March 1, 1901 (31 Stat. 861).

The Court will also take judicial notice of the fact that practically all of the lands in Indian Territory, prior to statehood, were allotted in severalty to members of the various tribes of Indians; that practically all lands belonging to said tribes remaining unallotted were authorized to be and have been sold under various Acts of Congress by the Secretary of the Interior, and that a very small proportion of the lands formerly belonging to the Five Civilized Tribes in Oklahoma, is now owned by said Indian tribes; that Congress, beginning with the Act of April 21, 1904 (33 Stat. 189), and ending with the Act of May 27, 1908 (35 Stat. 312), has removed the restrictions against alienation of approximately three-fourths of the allotted lands in the old Indian Territory part of the State of Oklahoma; and that patents to all lands allotted in severalty and to all lands sold under the Acts of Congress by the Secretary of the Interior, have been executed and delivered according to law, conveying the fee simple

title to such lands. Thus, the Indian title has been extinguished to practically three-fourths of the lands within the old Indian Territory part of the State of Oklahoma; and they have ceased to be Indian country within the meaning of that term as used in the general statutes of the United States and in the Act of 1897, according to the authorities above cited.

Without making any extended argument on the question, counsel wish to state that a careful examination of the form of patents by which the various Indian tribes parted with their title to the lands in Indian Territory, and of the various tribal agreements under which the allotments in severalty were made, and of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267), fails to disclose any provision, reservation or condition, either express or implied, which could have the effect of continuing the lands in Indian Territory as Indian country after the sale of the same at public auction or their allotment in severalty and the removal of all restrictions against their alienation by the allottees. In fact, there can be found no provision in any of the Acts of Congress relating to Indian Territory similar to that contained in the class of cases, of which *United States* v. *Forty-three Gallons of Whiskey,* 93 U. S. 188, and *Dick* v. *United States,* 208 U. S. 340, are illustrations.

Conclusion

In conclusion, therefore, the defendant respectfully submits, *first*, that the special Act of 1895 superseded or repealed the general Act of 1892 as to Indian Territory; *second*, that the special Act of 1895 was superseded or repealed *in toto* by the general Act of 1897, and by the Oklahoma Enabling Act of June 16, 1906, followed by the admission of Indian Territory into the Union as a part of the State of Oklahoma; and *third*, that even if the 1895 Act, in so far as it prohibits the interstate introduction of intoxicating liquors, and the Act of 1897 are both in force in Oklahoma, the allegations of the indictment are insufficient to charge the defendant with a violation of either Act. Accordingly, the judgment of the District Court in sustaining the defendant's demurrer to the indictment should be affirmed.

Respectfully submitted,

JAMES C. DENTON,
Attorney for Defendant in Error.

April 1, 1913.

UNITED STATES *v.* WRIGHT.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 918. Argued April 11, 1913.—Decided May 26, 1913.

In determining the effect of statutes regarding the introduction of liquor into Indian country, within the territorial limits of Oklahoma, every consideration arising out of the guardianship of the Federal Government over the Indians and control of their land indicate that as to them the liquor prohibition should be maintained after Statehood so far as consistent with the control of the State over its internal police.

The liquor prohibition, so far as it concerns Indians, has always been deemed one of the peculiar responsibilities of the Federal Government.

The provisions of § 2139, Rev. Stat., as amended by the acts of July 23, 1892, and January 30, 1897, so far as they related to the introduction of liquor into the Indian Territory from points outside of that Territory, but within what is now Oklahoma, have not been repealed, either expressly or by implication, by the Oklahoma Enabling Act.

THE facts, which involve the construction of the various acts relating to the introduction of intoxicating liquor into Indian country in Oklahoma, are stated in the opinion.

Mr. Assistant Attorney General Denison for the United States.

Mr. James C. Denton for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The defendant in error was indicted in the United States District Court for the Eastern District of Oklahoma, the charge being that—"on the nineteenth day of March, in the year 1912, in the County of Muskogee, in the said

District, and within the jurisdiction of said court, the said county and district then and there being a portion of the Indian country of the said United States, (he) did at the time and place aforesaid, unlawfully, wilfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to-wit, whiskey. Contrary to the form of the statute in such case made and provided," etc.

The District Court sustained his demurrer, and the case is brought here under the Criminal Appeals Act.

The statutes involved are: § 2139, Rev. Stat., as amended by the act of July 23, 1892, c. 234, 27 Stat. 260, and by the act of January 30, 1897, c. 109, 29 Stat. 506; also § 8 of the act of March 1, 1895, c. 145, 28 Stat. 693; and the Oklahoma Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267. Extracts from these are set forth in footnotes to the opinion in *Ex parte Webb*, 225 U. S. 663, 671, 677. Muskogee County is a part of what was the Indian Territory.

The District Court in effect construed the indictment as charging, not an interstate transaction, but an introduction of liquor from a point within the State of Oklahoma, but outside of what is now Indian country, into such Indian country. The decision of this court in the *Webb Case*, which had to do with § 8 of the act of March 1, 1895, and the effect of the Enabling Act upon it; and also the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States Express Co.* v. *Friedman*, 191 Fed. Rep. 673, and *Mosier* v. *United States*, 198 Fed. Rep. 54,—both of which turned upon the effect of the Enabling Act upon the act of January 30, 1897;—were reviewed by the District Court, and the conclusion reached, principally because of the line of reasoning expressed in the opinion in *Ex parte Webb*, was "That the provisions of § 2139, Rev. Stat., as amended by the act of 1892 and the act of 1897, so far as they related, if at all, to the introduction

of liquor into the Indian Territory from points outside of that Territory, but within what is now Oklahoma, must be considered as having been repealed by the Enabling Act."

And again: "This confines offenses of this character, of which the Federal court has jurisdiction, to those in which the liquor is introduced from a point without the State. It is a violation of the state law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the state court. In order to give the Federal court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the State. This is an essential element of the offense, so far as the Federal court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained."

The Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246, provides for a writ of error, to be taken by the United States from the District Court direct to this court, from a decision or judgment sustaining a demurrer to an indictment, "Where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." The present case is clearly within this act, as previously interpreted and applied. *United States* v. *Sutton*, 215 U. S. 291, 294; *United States* v. *Keitel*, 211 U. S. 370, 385; *United States* v. *Biggs*, 211 U. S. 507, 518; *United States* v. *Stevenson*, 215 U. S. 190, 195; *United States* v. *Miller*, 223 U. S. 599, 602; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *George*, 228 U. S. 14, 17; *United States* v. *Anderson*, 228 U. S. 52; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 100.

Upon the merits, the principal question is whether the acts of 1892 and of 1897 were repealed, as to intra-state

transactions, by the effect of the Enabling Act and the admission of the State, with the constitutional prohibition of the liquor traffic that was prescribed by that act. It is not contended that there was any express repeal. The insistence that there was a necessary repeal by implication, is supported by arguments that may be outlined as follows:

(a) That since the act of 1895 was a special act, applicable by name to the Indian Territory, it had the necessary effect of superseding as to that Territory the existing general statute (§ 2139, Rev. Stat., as amended in 1892) against the introduction and sale of intoxicating liquors in the Indian country.

(b) That § 8 of the act of 1895 was in turn superseded or repealed *in toto* by the act of 1897 and the Enabling Act.

(c) Or else, that the act of 1897, because amendatory only of the general statute against the introduction and sale of intoxicating liquors in the Indian country, had no effect upon the act of 1895, and did not apply to the Indian Territory because that Territory was covered by the act of 1895.

(d) And that whether the acts of 1892 and 1897, or either of them, was in force in Indian Territory prior to the admission of Oklahoma as a State, they were necessarily superseded as to intra-state transactions by the force and effect of that act, upon the same grounds on which this court said in the *Webb Case* that the act of 1895 was superseded.

Section 2139, Rev. Stat., providing for the punishment of persons introducing liquor into the Indian country, traces its origin to § 20 of the Indian Intercourse Act of June 30, 1834, c. 161, 4 Stat. 729, 732, as amended by act of March 15, 1864, c. 33, 13 Stat. 29. The amendment of 1892 (set forth in 225 U. S. 671), extended the prohibition to include ale, beer, and intoxicating liquors of any kind, as well as ardent spirits and wine, and added a clause